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No. (1)

In the
Supreme Court of the United States

MOHAMMED AL-ADAHI, DETAINEE,
CAMP DELTA, GUANTANAMO BAY NAVAL STATION,
GUANTANAMO BAY, CUBA;
MIRIAM ALI ABDULLAH AL-HAJ,
NEXT FRIEND OF MOHAMMED AL-ADAHI,
Petitioners,

v.

BARACK OBAMA;
ROBERT M. GATES; TOM COPEMAN,
Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a civil case in which different inferences can be drawn from a trial record containing live testimony, whether the Court of Appeals improperly revised the "clearly erroneous" standard of review articulated in *Anderson v. City of Bessemer*, 470 U.S. 564 (1985), by imposing "conditional probability," as an amorphous legal standard.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Mohammed Al-Adahi, along with his next friend Miriam Ali Abdullah Al Haj, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

Petitioner seeks review of the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit entered July 13, 2010, *Al-Adahi v. Obama*, Nos. 09-5333, 09-5339, 2010 WL 2756551 (D.C. Cir. July 13, 2010). Pet. App. 1a-24a. The decision of the District Court is *Al-Adahi v. Obama*, No. 05-280, 2009 WL 2584685 (D.D.C. Aug. 21, 2009). Pet. App. 25a-64a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered July 13, 2010.

INTRODUCTION

In *Rasul v. Bush*, 542 U.S. 466 (2004) and in *Boumediene v. Bush*, 553 U.S. 723 (2008), this Court held that the men imprisoned by the United States government at Guantánamo could challenge their confinement through the writ of habeas corpus. 542 U.S. at 476; 553 U.S. at 795. In *Boumediene*, the Court ordered the district courts to try the cases without further delay. Guantánamo habeas cases are tried

without a jury by Judges of the United States District Court for the District of Columbia.

In the instant case, the District Court heard evidence for four days, including testimony given by Mr. Al-Adahi via video link to Guantánamo. Like any witness appearing in person before the Court, Mr. Al-Adahi was subjected to the government's cross-examination. Weighing contested facts from which competing inferences could be drawn, the District Court wrote a carefully reasoned forty-two page opinion holding that the government had failed to prove by a preponderance of the evidence that Mr. Al-Adahi was a "part of" al-Qaeda. The Court therefore held that he could not be detained by the government.

The Court of Appeals reversed and, in doing so, departed from the accepted and usual course of judicial proceedings and committed two errors widely applicable to other cases, including pending habeas cases. Those errors were: (1) substituting its judgment of the facts for that of the experienced trial court by imposing on the "clearly erroneous" standard of review a sophistic, undefined "conditional probability" standard drawn from mathematics; and as a part thereof, (2) interpreting the Authorization for the Use of Military Force as creating an irrebuttable presumption that a stay at an al-Qaeda/Taliban guest house or attendance at a training camp authorizes indefinite detention.

STATEMENT OF THE CASE

Petitioner is a citizen of Yemen and a long time employee of the Yemen Oil Company who traveled with his sister to Afghanistan in July 2001. Pet. App.

68a, 72a-73a. Mr. Al-Adahi was detained by Pakistani police near Peshawar, Pakistan in October 2001. Pet. App. 85a.

A. Petitioner's travel to Afghanistan

In July 2001, a forty-year old Mr. Al-Adahi was a twenty-year employee of the Yemen Oil Company with a wife and two children, then aged three and five. Pet. App. 66a-70a, 88a. Mr. Al-Adahi had never left Yemen before and had never heard of Al Qaeda. Pet. App. 67a-68a, 78a. His sister, Amani, was married by contract, as is the custom in Yemen, to a man in Afghanistan. Pet. App. 67a-68a. Traditional Yemeni women do not travel alone. In July 2001, Mr. Al-Adahi applied for and received a six-month leave of absence from his job to take his sister to Afghanistan.[1] Pet. App. 82a.

The trip was arranged by his soon to be brother-in-law, Riyadh, a man close to Usama bin Laden, but known only casually by Mr. Al-Adahi. Pet. App. 67a-70a. Mr. Al-Adahi had never traveled before and did not know how to obtain a passport or visa. Pet. App. 68a. Riyadh told him to meet a man named Ali Yayha in front of a certain bank and to wear a red coat so Yayha would recognize him. Pet. App. 70a-71a. Mr. Al-Adahi did so and received passports, travel visas and airline tickets in his name and his sister's name. Pet. App. 68a-73a. Mr. Al-Adahi's passport was in his possession when he was arrested in Pakistan in 2001. Pet. App. 79a-80a.

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[1] No evidence suggested that such a leave of absence was anything but common in Yemen.

B. Petitioner's activities in Afghanistan

Usama bin Laden hosted the celebration of Amani and Riyadh's marriage for male guests in July 2001 in Kandahar, Afghanistan. Pet. App. 89a. Mr. Al-Adahi met bin Laden there for the first time and was summoned to meet him the next week. Pet. App. 74a-77a. Usama bin Laden met with foreigners--that is, Arabs--arriving in Kandahar to determine whether they were dangerous to him, and bin Laden quizzed Mr. Al-Adahi for 5-10 minutes about people in Yemen to make sure he was in fact a Yemeni.[2] *Id.* Thereafter, Mr. Al-Adahi stayed for a period in the home of his new brother-in-law, Riyadh, whom the Court of Appeals refers to as "al-Qaida". Pet. App. 9a, 80a. With several months on his hands, Mr. Al-Adahi went to a guest house and then to Al Farouq, an Al Qaeda and Taliban training camp, for one week. Al-Adahi testified he wanted general weapons training and "Islamic education." Pet. App. 80a.[3] The program at Al Farouq consisted of basic weapons training for the first two weeks. Pet. App. 93a.

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[2] The Court of Appeals found this explanation "utterly implausible" because by 2001 bin Laden was in hiding, the Court found. Pet. App. 11a-12a. The Court's inference is contradicted by the evidence. In July 2001, though bin Laden had been targeted by the United States, he in fact was living occasionally at his compound in Kandahar, was considered the "governor" of Kandahar, and hosted the male wedding celebration at his compound. Pet. App. 74a, 89a. The evidence and common sense suggest that *because* bin Laden was targeted that he would check out strangers coming to Kandahar who might encounter him to determine whether they posed a danger.

[3] The Court of Appeals erroneously interpreted "Arabs" to mean "Muslims." Pet. App. 13a.

Mr. Al-Adahi refused to follow orders at Al Farouq and was expelled from the camp after one week. Pet. App. 80a, 86a. No evidence suggests Mr. Al-Adahi was trained in skills for terrorism. After leaving the camp, Mr. Al-Adahi traveled to other cities in Afghanistan. Pet. App. 81a-82a. He was injured slightly riding a motorcycle. Pet. App. 85a.[4] The United States started bombing Afghanistan on October 7, 2001. Pet. App. 199a, ¶ 42.

C. Petitioner's arrest in Pakistan

After his motorcycle accident, Mr. Al-Adahi went to a hospital to have his arm treated and found there other men who were leaving Afghanistan by bus.[5] Pet. App. 85a. Mr. Al-Adahi joined them. *Id.* Near Peshawar, Pakistan Mr. Al-Adahi was taken off the bus by Pakistani authorities and taken to a local hospital. *Id.* He was told he would be turned over to

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[4] Respondents assert Mr. Al-Adahi told inconsistent stories to interrogators about his injury. They did not call any of those witnesses to testify, did not supply any transcripts or videotapes of interrogations and, most oddly, did not cross examine Mr. Al-Adahi on the subject when he testified. Thus, the accounts given by his interrogators came before the District Court (over Petitioner's objection) only through written reports, the authors of which could not be cross examined.

[5] Most likely – though the record is silent on the point—the men were wounded in the intensive American bombing which affected soldiers and civilians alike. The Wall Street Journal recently reported that bombing was insufficiently precise that a December 2001 meeting between American agents and Hamid Karzai, the man chosen to lead the new government of Afghanistan, was targeted. Siobhan Gorman, *CIA Man is Key to U.S. Relations with Karzai*, WALL ST. J., Aug. 24, 2010, at A8.

the Yemeni embassy. *Id.* Instead, he was arrested and, he believes, sold for a bounty to the United States. Pet. App. 84a. In his pocket were his passport and airline tickets home to Yemen. Pet. App. 79a-80a, 85a. He carried no weapon. On his wrist was a common Casio watch, with hands, not an electronic version.[6] Pet. App. 87a. Mr. Al-Adahi was sent to Guantánamo eight and one half years ago.

D. The detention standard

Following the attack on the United States on September 11, 2001, Congress passed the "Authorization for the Use of Military Force" ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001). The AUMF does not specifically mention detention of enemy armed forces. Interpreting the AUMF, the District Court adopted the following broad standard, widely used in Guantánamo cases,[7] against which to test the facts relevant to Mr. Al-Adahi:

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[6] The Government has consistently claimed that Casio watches are linked to al-Qaeda and terrorist activity – notwithstanding that Casio had built such "an avid following among collectors world-wide over the years" that 19 million of the Casio brand watch "G-Shock" alone had been sold worldwide by 1998. G-Shock, WIKIPEDIA.ORG, http://en.wikipedia.org/wiki/G-Shock (last visited Sept. 22, 2010). In any event, Mr. Al-Adahi testified that his watch had hands and was not an electronic version. Pet. App. 87a. Respondents had possession of Mr. Al-Adahi's watch but did not offer it in evidence. That his watch had hands, not an electronic version used to detonate bombs, is not contradicted in the record.

[7] Some of the other District Judges used a standard more favorable to the detainee. *See Hamlily v. Obama*, 616 F. Supp. 2d 63, 76 (D.D.C. 2009) (excluding from detention those who were only "substantial support[ers]" of the Taliban or al-Qaeda).

> the Government has the authority to detain individuals who were part of, or substantially supported, al-Qaida and/or the Taliban, provided that those terms "are interpreted to encompass only individuals who were members of the enemy organization's armed forces, as that term is intended under the laws of war, at the time of their capture."

Pet. App. 30a. The question as presented by the government was thus whether Mr. Al-Adahi was part of or substantially supported al-Qaeda[8] as a member of al-Qaeda's forces.

E. Petition and Response

Following this Court's decision in *Rasul*, a petition for habeas corpus was filed February 7, 2005 on behalf of Mr. Al-Adahi by his mother as next friend. Pet. App. 26a.[9]

In its response, the government claimed that Mr. Al-Adahi was held properly as an "enemy combatant," a characterization they have since abandoned. Pet. App. 29a. The government relied principally on the

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[8] Respondents have never contended Mr. Al-Adahi was part of the Taliban.

[9] At the time, the government refused to disclose who was held in Guantánamo. Filing a petition was the only way to determine that a man was there. *See Associated Press v. United States Department of Defense*, No. 05 Civ. 5468 (JSR), 2006 WL 2707395 (S.D.N.Y. Sept. 20, 2006), *rev'd*, 554 F.3d 274 (2d Cir. 2009). In the meantime, the Defense Department released publicly the names of the men held. *See* http://www.dod.gov/pubs/foi/detainees.

allegations that his brothers-in-law were Usama bin Laden bodyguards, that Mr. Al-Adahi was a bodyguard and trainer at Al Farouq, a Taliban/Al Qaeda-sponsored training camp, and that Mr. Al-Adahi possessed a Casio watch. After Mr. Al-Adahi told government interrogators that he met Usama bin Laden, stayed one night in a guest house and attended Al Farouq, for a week, those became the primary charges against him to prove that he was part of Al Qaeda's forces.[10]

Though filed in February 2005, Mr. Al-Adahi's petition was not heard on the merits until June 2009 because of the delays successfully challenged in *Boumediene*. Prior to trial, District Judge Kessler, who had this case, consolidated it with most others then pending for pre-trial proceedings before then Chief Judge Hogan, who entered a governing pre-trial order. Pet. App. 27a-28a. In this case, the District Court directed the parties to list the issues to be tried and, following a pretrial conference, entered an order directing the parties to introduce their evidence related to those issues. Pet. App. 37a. The Court granted the government a presumption of authenticity as to all of its evidence. Pet. App. 32a. All of the government's evidence was offered in the form of general affidavits and documents. The affidavits were not specific to Mr. Al-Adahi (none mentioned his name

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[10] The government also contended that Mr. Al-Adahi was an instructor at Al Farouq and a bin Laden bodyguard in 2000. Pet. App. 48a, 53a. Those allegations, based on the statements of Janko and Bukhary, two Guantánamo detainees who even the government interrogators found to be not credible, made no sense in any possible time line.

or government-assigned number) but were used in many habeas hearings. Pet. App. 31a.

F. The District Court trial

On June 22-25, 2009, Petitioner's habeas trial proceeded in the United States District Court for the District of Columbia. Mr. Al-Adahi testified live on his own behalf and was subjected to cross examination by government attorneys. The District Court observed his testimony[11] and heard argument for an additional three and one half days about the inferences and conclusions to be drawn from the government's evidence. Despite the plurality's invitation in *Hamdi v. Rumsfeld*, no intelligence expert testified or offered an affidavit opining that Mr. Al-Adahi was linked to al-Qaeda. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533-34 (2004). The government relied exclusively on hearsay evidence,[12] including short summaries of interviews prepared by interrogators at Guantánamo following hours-long interviews of Mr. Al-Adahi.[13] The

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[11] While the District Court did not explicitly state its view of Mr. Al-Adahi's credibility, that the Court relied on his testimony establishes that it found him credible as to some issues. *See., e.g.*, Pet. App. 40a, 42a-43a, 45a.

[12] Hearsay, including certification of the "true cause of the detention" is routine and appropriate in post conviction proceedings. 28 U.S.C. § 2243; *e.g., Sawyer v. Whitley*, 505 U.S. 333, 349-50 (1992). By contrast, in *Hamdi v. Rumsfeld* the plurality found that "[h]earsay . . . may need to be accepted as the most reliable available evidence. . . ." 542 U.S. at 533-34. Here, there was no showing of "need."

[13] Petitioner objected to the admission of Respondents' hearsay evidence as violative of the Federal Rules of Evidence, which are

government relied on no "battlefield evidence," because none existed.[14]

G. The District Court considered the facts under the detention standard

The government produced no evidence that Mr. Al-Adahi was involved in combat against the United States or its allies. As he testified, he does not "support killing innocents" and has "never participated in any fight." Pet. App. 90a-91a. He never committed or conspired to commit any terrorist acts. He had no fore-knowledge of the tragic events of 9/11. Apart from one week at a training camp in Afghanistan, Mr. Al-Adahi never was in a command structure and, in the week at camp, he refused to take orders. Indeed, he was thrown out of the camp for smoking cigarettes.[15] He never pledged his allegiance to Usama bin Laden or to

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specifically made applicable to habeas proceedings in Rule 1101(e), and as violative of the confrontation clause of the Sixth Amendment to the Constitution since these proceedings could result in indefinite incarceration. *Crawford v. Washington*, 541 U.S. 36 (2004). The District Court overruled Petitioner's objections and admitted all of Respondents' evidence. Pet. App. 34a.

[14] Had Mr. Al-Adahi been detained on a battlefield, that evidence would have been produced. The government told the Court in *Hamdi* that "documentation regarding battlefield detainees already is kept in the ordinary course of military affairs." *Hamdi*, 542 U.S. at 534.

[15] Smoking was a repudiation of bin Laden's Wahhabism. *See, e.g.*, Charles Allen, *God's Terrorists: The Wahhabi Cult and Hidden Roots of Modern Jihad* 56 (2006) ("Although Al-Wahhab's main targets were the Sufis and the Shias . . . many everyday habits were also declared sinful, among them smoking tobacco.")

al-Qaeda. The government has never suggested that Mr. Al-Adahi would be charged with any crime, but the government opposes his release to return home to his family in Yemen, where he was headed when detained by Pakistani authorities. Pet. App. 83a-84a. Mr. Al-Adahi testified through an interpreter:

> When people start to get afraid that America will bomb Afghanistan, and I have been trying to find a way to get out and go back to my country. I did not fight the American. I did not fight the American alliance. I did not deal with Taliban or Al Qaeda. I am a working man in my country. I never committed a crime. I am 47 years old.

Id.

The District Court was left to consider the facts, some disputed, from which to draw inferences and then to consider all of the facts taken together. Each disputed fact gave rise to multiple potential inferences. The District Court explicitly considered each of the issues individually and then considered them as a whole: "When all is said and done, this is the evidence we have in this case," the Court wrote. Pet. App. 60a. The Court then listed each of the facts upon which the government relied and considered them as a whole. In doing so, this trial judge with thirty years' experience, carried out the function described in *Anderson v. City of Bessemer*, 470 U.S. 564, 574-75 (1985): "The trial judge's major role is the determination of fact, and with experience in fulfilling that rule comes expertise." The Court concluded that the government had failed to carry its burden to prove by a preponderance of evidence its factual allegation that Petitioner was part

of al-Qaeda. The Court granted his petition for habeas corpus.

II. The Court of Appeals' Decision

The government appealed. On July 13, 2010, the Court of Appeals reversed and instructed the trial court to deny the petition for habeas corpus. Pet. App. 21a. The Court of Appeals began its review of the factual determinations by stating, "but before we get to the specifics we need to mention an error that affects much of the district court's evaluation of the evidence. The error stems from the court's failure to appreciate conditional probability analysis." Pet. App. 7a-8a. The Court goes on to cite a single 1993 decision by the same court related to probable cause determinations, *United States v. Prandy-Binett*, 5 F.3d 558 (D.C. Cir. 1993), and a popular paperback book from 1988, "*Innumeracy: Mathematical Illiteracy and its Consequences,*" by J. A. Paulos, a Professor of Mathematics.[16]

Relying on that authority, the Court of Appeals found that if the District Court had used conditional probability analysis, it would have viewed differently the evidence as a whole. Purporting to use "conditional probability," the Court weighed the evidence and came to the factual conclusion that "there can be no doubt that Al-Adahi was more likely than not part of al-Qaida." Pet. App. 9a. The Court went on to elevate

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[16] Dr. Paulos is a professor at Temple, whose most recent book is *Irreligion: A Mathematician Explains Why the Arguments for God Just Don't Add Up* (2008).

dicta from *Al-Bihana v. Obama*, 590 F.3d 866 (D.C. Cir. 2010) to a determination of law:

> His attendance at an al-Qaida military training camp is therefore—to put it mildly—strong evidence that he was part of al-Qaida. In *Al-Bihani*, we stated that if a person stays at an al-Qaida guesthouse or attends an al-Qaida training camp, this constitutes "overwhelming" evidence that the United States had authority to detain that person.

Pet. App. 15a-16a (citing 590 F.3d at 873, n.2). The Court of Appeals found that evidence alone was sufficient: "We disagree that this evidence, standing alone, was insufficient." Pet App. 16a. The Court thus redefined the detention standard under the AUMF to include as an alleged enemy combatant someone who stayed in al Qaeda/Taliban guest house or training camp.

REASONS FOR GRANTING THE WRIT

This case raises crucial issues by imposing a new sophism, "conditional probability," as a standard of appellate review for any case in which the district court sits without a jury. "Conditional probability" was described by the dissent in *United States v. Prandy-Binett*, as "nothing more than gobbledy-gook." 995 F.2d 1069, 1077 (D.C. Cir. 1993) (Edwards, J., dissenting). *Prandy-Binett* is a probable cause opinion in which the D.C. Circuit properly[17] utilized the de novo appellate standard to review the legal conclusion of whether

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[17] *See Ornelas v. United States*, 517 U.S. 690 (1996).

probable cause existed to warrant arrest. But, in this case, the clearly erroneous standard applied to factual findings, not a de novo standard. The Circuit used its faux statistical conditional probability methodology to authorize the appellate court in any non-jury case to substitute its judgment on the facts for that of trier of facts. In doing so, the court upended the deeply rooted and clearly understood roles of the trial and appellate courts.

In addition, the Court of Appeals' direction that staying at guest houses or training camps is sufficient evidence to prove that a man is part of al-Qaeda (Pet. App. 13a-14a), is contrary to the plurality's detention standard in *Hamdi v. Rumsfeld*, 542 U.S. at 526. Perhaps one-hundred petitioners have cases pending in the District Court for the District of Columbia governed by the Circuit's erroneous opinion in *Al-Adahi*. If the erroneous standard is not corrected, those cases will be tried on the wrong legal and factual premises.[18]

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[18] In *Boumediene*, the Court directed the District Courts to try the petitioners' habeas cases without further delay. 553 U.S. at 794. While they have proceeded to do so, hearing facts and deciding that the men are held improperly in 37 cases, the Court of Appeals has relentlessly ruled against petitioners. In only one case has a panel of the Circuit found for the detainee. *Compare Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010) (remanded for further consideration by the District Court) *with Al-Bihana*, 590 F.3d 866; *Awad v. Obama*, 608 F.3d 1, 4 (D.C. Cir. 2010); *Barhoumi v. Obama*, 609 F.3d 416, 418-19 (D.C. Cir. 2010); *Al Odah v. United States*, 611 F.3d 8, 11 (D.C. Cir. 2010).

A. The Court of Appeals impermissibly imposed on this and other District Court cases a "conditional probability" gloss on Anderson in substituting its judgment of the facts for the decision of the experienced District Court.

This Court's appellate standard of review is unequivocal in its deference to the District Court in circumstances such as these. Federal Rule of Civil Procedure 52(a)(6) states:

> Findings of Fact . . . must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

Thus, when a District Court makes findings of fact, it cannot be reversed unless its decision is clearly erroneous, a concept the meaning of which is "not immediately apparent." *Anderson*, 470 U.S. at 573. The Court set forth principles governing that concept, the foremost of which is that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

But that principle has limitations:

> This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty

> under Rule 52(a) if it undertakes to duplicate the role of the lower court.

Id. Plainly, the Court of Appeals would and did decide *Al-Adahi* differently from the District Court which heard the case for four days. But in doing so, it violated *Zenith Radio Corp v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969), by using conditional probability in "deciding the factual issues *de novo*." As the Court observed in *Anderson*, "[d]uplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources." 470 U.S. at 574-75. Here, the appellate court only detracts from the accuracy of the decision; the crucial evidence was the live testimony of Mr. Al-Adahi.

The instructions in *Anderson* continue: if the findings were plausible, which the District Court's plainly were, they cannot be reversed. And there is more: "Where there are two permissible views of the evidence, *the factfinder's choice between them cannot be clearly erroneous.*" *Id.* at 574 (emphasis added)

> This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts.

Id. Before demonstrating that the District Court's rejection of the government's contentions was more than merely "permissible," the Court of Appeals' error in substituting its judgment for that of the District Court bears analysis.

The Court of Appeals stated:

> [B]ut before we get to the specifics we need to mention an error that affects much of the district court's evaluation of the evidence. The error stems from the court's failure to appreciate conditional probability analysis.

Pet. App. 7a-8a. The Court of Appeals' decision creating the concept of "conditional probability," *United States v. Prandy-Binett*, 5 F.3d 558 (D.C. Cir. 1993), involved probable cause, not the preponderance standard applicable here. The legal principle of "probable cause" is not a "'finely-tuned standard[],' comparable to the standards of proof beyond a reasonable doubt or of proof by a preponderance of the evidence." *Ornelas v. United States*, 517 U.S. 690, 696 (1996) (quoting *Illinois v. Gates*, 462 U.S. 213, 235 (1983)). This Court in *Ornelas* held that determination of "probable cause should be reviewed de novo on appeal." 517 U.S. at 699.[19]

But what is "conditional probability"? The Circuit does not define it more than to say that "some events are independent (coin flips, for example), other events are dependent: 'the occurrence of one of them makes the occurrence of the other more or less likely. . . .'" Pet. App. 8a. That "definition" is then used to support the Circuit's view of the evidence in *Al-Adahi*.

In *Prandy-Binett* the district court suppressed evidence, finding no probable cause for a search and

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[19] *Ornelas* was decided after *Prandy-Binett*, but the *Ornelas* standard was in use in *Prandy-Binett*. 995 F.2d at 1079 n.5.

that was the issue for review. The measure of probable cause lies, according to the Court, "[s]omewhere between less than evidence which would justify . . . conviction and more than bare suspicion." 995 F.2d at 1070 (second alteration in original and internal quotation marks omitted). The appellate standard of review was de novo for the legal conclusion of no probable cause and clearly erroneous for facts found. 995 F.2d at 1079 n.5.

The dissent in *Prandy-Binett* stated the majority was simply substituting its judgment about the facts by using "conditional probability."

> The majority, relying on a bizarre theory of "conditional probabilities," holds that probable cause can be based on the appearance of duct tape.

995 F.2d at 1074 (Edwards, J., dissenting). It continued:

> In order to reach the conclusion that Prandy-Binett was legally arrested, the majority purports to examine so-called "conditional probabilities," as if to suggest that there is some mathematical equation. . . . But, stripped of the fancy label, the discussion of conditional probabilities is nothing more than gobbledy-gook that in no way obscures the sad truths in this case.

Id. at 1077. The Circuit here used that "fancy label" to substitute its view of the facts.

The Court of Appeals' use of "conditional probability" is simply wrong. Fact finding is not a science nor is it mathematics. It is, at its core, testimonial. "Nothing can be more essential that the cross-examining [of] witnesses, and generally before the triers of the facts in question. . . . [W]ritten evidence . . . [is] almost useless; it must be frequently taken ex parte, and but very seldom leads to the proper discovery of truth." *Crawford v. Washington*, 541 U.S. 36, 49 (2004) (alteration in original) (quoting R. Lee, *Letter IV by the Federal Farmer* (Oct. 15, 1787) (Sixth Amendment case)). "The common-law tradition is one of live testimony in court subject to adversarial testing. . . ." 541 U.S. at 43. The government offered no excuse why not even one of their witnesses could come to trial.

The District Court properly considered and weighed all of the evidence, and drew perfectly plausible inferences. First, the District Court included a lengthy discussion explaining that, while the evidence is viewed in its totality, that does not mean that the sum of all the evidence is necessarily more credible than its parts standing alone:

> Even using the Government's theoretical model of a mosaic, it must be acknowledged that the mosaic theory is only as persuasive as the tiles which compose it and the glue which binds them together -- just as a brick wall is only as strong as the individual bricks which support it and the cement that keeps the bricks in place. Therefore, if the individual pieces of a mosaic are inherently flawed or do not fit together, then the mosaic will split apart, just as the brick wall will collapse.

Pet. App. 35a-36a. Before discussing the allegations and evidence, the District Court concluded "that existing evidence must be weighed and evaluated as to its strength, its reliability, and the degree to which it is corroborated." Pet. App. 36a.

Since no direct or objective evidence places Mr. Al-Adahi as supporting al-Qaida as a member of its forces, the trial court carefully and exhaustively considered his testimony and the government's circumstantial evidence. The Court considered the weight to give to Mr. Al-Adahi's travel to Afghanistan, the fact that his new brother-in-law likely was a member of al-Qaeda and the fact that Mr. Al-Adahi met bin Laden twice. Pet. App. 37a-41a. Mr. Al-Adahi met Usama bin Laden at the wedding celebration and then was summoned to meet with him for 5-10 minutes two weeks after Al-Adahi's arrival in Afghanistan. Pet. App. 76a-77a. Mr. Al-Adahi testified that bin Laden was in Kandahar and wanted to determine whether Mr. Al-Adahi really was a Yemeni. Pet. App. 76a. That explanation is perfectly logical--as the government argued, bin Laden knew he was marked. He met newcomers to Kandahar to determine if they were dangerous to him. Under the applicable detention standard, the facts prove little.

The Court of Appeals, however, considered the evidence de novo. It began with "Al-Adahi's ties to Bin Laden" and says the District Court "tossed aside" the fact. Pet. App. 9a. It did nothing of the sort. What the Circuit Court terms a failure to consider conditional probability was in fact the District Court engaging in determining credibility and drawing inferences incumbent on all fact finders. It concluded that Al-Adahi's brother-in-law's close association with bin

Laden and Al-Adahi meeting him offer little evidence that Al-Adahi was himself a member of Al Qaeda. Pet. App. 37a-41a. The District Court obviously was correct. The Court drew the clearly permissible inference under *Anderson* that Al-Adahi took his sister to Afghanistan and, finding that her husband-to-be was a friend of Usama bin Laden, met him. These facts, it found, say little about Mr. Al-Adahi taking orders from or being part of the al-Qaeda structure. *Id.*

But the Court of Appeals preferred the government's inference: "That close association [with bin Laden] made it far more likely that Al-Adahi was or became part of the organization." Pet. App. 12a. The Court of Appeals found Mr. Al-Adahi's testimony about meeting with bin Laden "utterly implausible" citing only the government's brief. Thus, the Court of Appeals would draw some nefarious conclusion from the 5-10 minute meeting. The District Court accepted the testimony rather than the scoff, and the Court of Appeals, not having seen Mr. Al-Adahi's testimony, had no basis for substituting its judgment. "When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson*, 470 U.S. at 575.

What inference can be drawn from the fact that Mr. Al-Adahi stayed in a guest house one night? One inference is that, having met bin Laden and with a new al-Qaeda brother-in-law, he was on his way to membership in al-Qaeda, albeit not yet there. Pet. App. 13a-14a. Another is his testimony that, like most

of the world, he had never heard of al-Qaeda before 9/11 and that he slept at the guest house one night to be with other Arabs rather than to join al-Qaeda. He testified: "The guesthouses are the gathering of the Arab and the Muslim. I met some Arab, and they suggested that I go to this guest house. You will meet people instead of being alone." Pet. App. 79a. Mr. Al-Adahi *was* isolated—in Afghanistan, the dominant languages are Pashto and Dari (a Persian dialect), not Arabic.[20] The District Court rejected the government's proposed inference.

The most important fact from the government's view point was Mr. Al-Adahi's testimony that he spent one week at Al Farouq and then was kicked out. Pet. App. 80a. One inference: Mr. Al-Adahi became part of Al Qaeda, albeit quickly and at the bottom. Another inference: his live testimony that he did not know what Al Farouq was, that he went there for Islamic studies and weapons training, after one week was expelled, and never joined or became part of al-Qaeda. Pet. App. 80a, 83a-84a.[21] The District Court found a logical inference based on live testimony from Mr. Al-Adahi, which "demands even greater deference to the trial court's findings;" the appellate court cannot reject it under *Anderson*. 470 U.S. at 575. But that is exactly what the Court of Appeals did, concluding that it is not "important to determine Al-Adahi's motive for attending the al Qaida training camp." Pet. App. 15a.

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[20] http:en.Wikipedia.org/wicki/Languages-of-Afghanistan.

[21] The government argues quite improbably that having compulsory service in the Yemeni army 20 years earlier was enough training. Pet. App. 15a. That argument suggests little knowledge of the evolution of modern weapons.

Applying the convenient conditional probability theory,[22] the Court of Appeals finds Mr. Al-Adahi's time spent at Al Farouq to be overwhelming and conclusive evidence that he is part of al-Qaeda.[23] Pet. App. 15a-16a (finding that this evidence standing alone is sufficient).

That the government, or any advocate, could string together six or seven facts, each with a non-culpable inference, does not prove the important conclusion--that Mr. Al-Adahi became part of al-Qaeda. Indeed, those inferences are contrary to the undisputed evidence that al-Qaeda was a small organization, made up mostly of educated Egyptians and Saudis, and that it looked for men "who were white-collar, skilled,

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[22] Contrary to the Court of Appeals' belief, to the extent conditional probability is understood as a statistical or mathematical model, the District Court used it accurately. One first sorts through the facts, rejecting those that are unreliable. Thereafter, a statistician, mathematician or, in this case a judge, considers those that remain to reach a conclusion. But the art of judging facts cannot be reduced to a simple mathematical formula. As Dr. Paulos himself has acknowledged: "One must be careful when dealing with conditional probabilities." Paul L. Kaminsky, Note and Comment, *The Wrap on Probable Cause: The Fourth Amendment Contained*, 6 ST. THOMAS L. REV. 449, 471-72 (1994) (quoting John A. Paulos, *Beyond Numeracy: Ruminations of a Numbers Man*, 190 (1991)). Mathematical "applications are only as good as the underlying empirical assumptions, simplifications, and estimations that go into them." J. A. Paulos, *Innumeracy*, 67 (1988).

[23] The Court of Appeals dwells on related issues—Mr. Al-Adahi's knowledge of Al Farouq and bin Laden bodyguards. The government made no attempt to distinguish his knowledge in 2001 from what he learned during several years in Guantánamo. Pet. App. 14a, 17a-18a.

multi-lingual (usually speaking a Western language), wealthy, well educated and equipped with special talents advantageous to the organization." Pet. App. 111a-112a, ¶ 30. Al-Adahi was far from that description, was not a candidate for Al Qaeda, and the District Court properly drew that inference based on the evidence as a whole, including Al-Adahi's live testimony.

Al-Adahi's circumstances are quite different from the government's assertions that the Circuit has found sufficient for detention. Al-Bihani was a cook for a the 55th Arab Brigade in Afghanistan, which the Circuit found sufficient to be part of an Al Qaeda or Taliban force. *Al-Bihana*, 590 F.3d at 872.[24] Ali Awad allegedly fought with Al Qaeda fighters in a hospital in Afghanistan. *Awad v. Obama*, 608 F.3d at 4. Barhoumi, the government claimed, trained in "tactical movement, navigation, artillery and military tactics" and fought with Abu Zubaydah "a reputed terrorist leader." *Barhoumi,* 609 F.3d at 418-19. Al Odah, Respondents assert, fought with 150 men at Tora Bora and carried an AK-47. *Al Odah*, 611 F.3d at 11.

Here, lacking a nexus to al-Qaeda, the Court of Appeals went so far as to make up facts not in the record, such as its paragraph devoted to the Al Qaeda training manual for resisting interrogation. Pet. App. p. 19a-20a. That document, found in Great Britain, is not linked in the record to Mr. Al-Adahi. The Court of Appeals further accepts the government's inference

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[24] These cases are cited to show the allegedly different facts, not to suggest in any way that they were correctly decided.

that Mr. Al-Adahi's travels in Afghanistan before the American bombing started in October 7, 2001 added weight to the government's arguments that he must have been fighting for al-Qaeda. Pet. App. 18a-19a. How is not explained; apart from the Taliban civil war, this record is devoid of evidence about al-Qaeda fighting the United States or its allies before Mr. Al-Adahi was arrested or how he could have followed order to "persist in the jihad" (Pet. App. 19a), which the appellate court said Mr. Al-Adahi did.[25]

Thus, the Court of Appeals continued its pattern of frustrating the decisions of this Court. As shown above, it made up facts not in the record and cited to the government's brief in the absence of other support. The Supreme Court reversed the D.C. Circuit in *Rasul v. Bush*, 542 U.S. 466 (2004), *rev'g* 321 F.3d 1134 (D.C. Cir. 2003); in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), *rev'g* 415 F.3d 33 (D.C. Cir. 2005); and in *Boumediene v. Bush*, 553 U.S. 723 (2008), *rev'g* 476 F.3d 981 (D.C. Cir. 2007).[26]

The Court of Appeals never gave Petitioner a chance to rebut its interpretation of the facts.[27]

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[25] At that time, there were no more than 300 U.S. troops on the ground. Pet. Supp. App. Ex. 120a ¶ 44.

[26] All Guantánamo habeas cases came through the District of Columbia Circuit.

[27] The Circuit Court expressed its frustration with the government's unwillingness to urge a burden of proof lower than preponderance. In the District Court, Petitioner asked for a standard of clear and convincing evidence, the standard for civil commitment. *Addington v. Texas*, 441 U.S. 418 (1979). The government argued for, and the District Court accepted, a

"Conditional probability" was never mentioned by the government, the District Court or the Court of Appeals before the appellate court issued its opinion. As this Court explained in *Anderson*, "the trial on the merits should be the main event . . . rather than a tryout on the road." 470 U.S. at 575 (citation and internal quotations omitted).

This Court should exercise its supervisory powers because "conditional probability" is an amorphous concept that erroneously suggests that fact finding is a science. As such it can be used as "law" by a circuit court to substitute its judgment for that of the district court on issues of fact. *Anderson* demanded deference for the trial court fact finding. 470 U.S. at 573-76. In *Al-Adahi*, the Circuit reasserts its muscle. It is now the law of the D.C. Circuit that conditional probability can be used to permit the Circuit Court to become the fact-finder. This Court should overturn the Circuit's decision here.

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preponderance standard. Dissatisfied, after oral argument, the Circuit ordered the parties to brief the proper burden of proof, even though neither party had presented that issue on appeal. Pet. App. 6a. The parties agreed that preponderance or higher was the proper burden. The Circuit chided the government and made it known it would accept a lower burden of proof, despite this plurality's rejection of the government's "some evidence" standard in *Hamdi*, 542 U.S. at 527-528. *Id.*

B. Ordering the District Courts to find that a stay at a guest house in Afghanistan or attendance at a training camp is overwhelming and sufficient evidence that a man is properly held is erroneous and may lead to error in many of the one hundred cases remaining to be tried.

The Court of Appeals added impermissibly to the AUMF by significantly weakening the standard for detention. The plurality in *Hamdi* found:

> Under the definition of enemy combatant that we accept today as falling within the scope of Congress' authorization, Hamdi would need to be "part of or supporting forces hostile to the United States or coalition partners" and "engaged in an armed conflict against the United States" to justify his detention in the United States for the duration of the relevant conflict.

542 U.S. at 526. That standard is far more rigorous than a stay at a guest house or a short stay at a al-Qaeda/Taliban training camp. But the Court of Appeals has found that such a visit is overwhelming and sufficient evidence that a man is properly detained. Pet. App. 13a-14a. That evidentiary ruling imposes an irrebuttable presumption--one the Court of Appeals found was not overcome even by leaving the training camp after a week. The AUMF does not support such a facile interpretation.

Indeed this holding is the most dangerous for many of the petitioners yet to come before the district courts. Attendance at one or the other is a frequent charge by

the government's largely discredited detainee-witnesses. Pet. App. 48a-54a. In addition, much evidence and logic is to the contrary. Not surprisingly, Holiday Inns were scarce in Afghanistan and the evidence is overwhelming that guest houses were where visitors stayed. Pet. App. 102a-103a, ¶ 15. The provenance of those guesthouses was not always known and even an intentional stay in an al-Qaeda guest house hardly makes a man part of the al-Qaeda forces.

The same is true about a one-week stay at Al Farouq. Even if Mr. Al-Adahi intended to abandon his wife, children and job in Yemen—a proposition unlikely on its face—attendance for a week at a training camp may be the first, but far from the final step in becoming part of such a force. To say the least, there are two permissible views of the evidence, and that should be the end of the matter. *Anderson*, 470 U.S. at 574. The Court's postulate of overwhelming evidence is based on no principled analysis. It is ipsi dixit and should be reversed.

CONCLUSION

The decision by the Court of Appeals is erroneous and likely to lead to error in later decisions. The appellate court has added an erroneous gloss to this Court's clear decision in *Anderson*. In addition, its command to the district court's to find facts as overwhelming evidence of proper detention is sure to work mischief in the District Courts' consideration of the evidence supporting a man's potential lifetime detention. *See Hamdi*, 542 U.S at 521.

Petitioner requests that this Court grant his petition and reverse the decision of the Court of Appeals.

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APPENDIX

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APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5333

Argued February 15, 2010
Decided July 13, 2010

MOHAMMED AL-ADAHI, DETAINEE, CAMP DELTA, GUANTANAMO BAY NAVAL STATION, GUANTANAMO BAY, CUBA AND MIRIAM ALI ABDULLAH AL-HAJ, NEXT FRIEND OF MOHAMMED AL-ADAHI,

APPELLEES/CROSS-APPELLANTS

v.

BARACK OBAMA, PRESIDENT OF THE UNITED STATES, ET AL.,

APPELLANTS/CROSS-APPELLEES

Consolidated with 09-5339

Appeals from the United States District Court
for the District of Columbia
(No. 1:05-cv-00280-GK)

Anne Murphy, Attorney, U.S. Department of Justice, argued the cause for appellants/cross-appellees. With her on the briefs were *Douglas N. Letter* and *Robert M. Loeb*, Attorneys.

John A. Chandler argued the cause for appellees/cross-appellants. With him on the briefs were *Patricia L. Maher* and *Richard G. Murphy, Jr. Gregory S. Smith* entered an appearance.

Before: HENDERSON and KAVANAUGH, *Circuit Judges,* and RANDOLPH, *Senior Circuit Judge.*

Opinion for the Court filed by *Senior Circuit Judge* RANDOLPH.

RANDOLPH, *Senior Circuit Judge:* In the summer of 2001, a thirty-nine year-old Yemeni security guard took a six-month leave of absence from his job to move to Afghanistan. Leaving his wife and his two children, he stayed at the Kandahar home of his brother-in-law, a close associate of Usama bin Laden. Twice he met personally with bin Laden. From Kandahar he moved into a guesthouse used as a staging area for al-Qaida recruits. He then attended al-Qaida's Al Farouq training camp, where many of the September 11th terrorists had trained. He traveled between Kabul, Khost, and Kandahar while American forces were launching attacks in Afghanistan. Among other explanations for his movements, he claimed that he had decided to take a vacation. After sustaining

injuries requiring his hospitalization, he crossed the Pakistani border on a bus carrying wounded Arab and Pakistani fighters. This man, Mohammed Al-Adahi, who is now a detainee at Guantanamo Bay Naval Base, admits all of this but insists he was not a part of al-Qaida and never fought against the United States. Others identified him as a [redacted] On his petition for a writ of habeas corpus, the district court ordered him released. We reverse.

Pakistani authorities captured Al-Adahi in late 2001. In 2004, a Combatant Status Review Tribunal determined, by a preponderance of evidence, that he was part of al-Qaida. Al-Adahi filed his habeas corpus petition in 2005. In 2008 the Supreme Court ruled that despite statutes depriving the federal courts of jurisdiction to hear habeas petitions from Guantanamo detainees, the Suspension Clause of the Constitution at least preserved the writ as it existed in 1789. *Boumediene v. Bush*, 553 U.S. 723 (2008).

Al-Adahi's habeas petition presented the question whether he was part of al-Qaida and therefore justifiably detained under the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). The district court considered the government's two factual returns and Al-Adahi's three traverses, in addition to a substantial record that included intelligence reports, interrogation summaries, expert declarations, and Al-Adahi's direct and cross-examination (transmitted live from Guantanamo). The court found "no reliable evidence in the record that Petitioner was a member of al-Qaida" and ruled that he should be released. *Al-Adahi v. Obama*, No. 05-280, Mem. Op. at 41, 2009 WL 2584685 (D.D.C. Aug. 21,

2009) ("Mem. Op."). The government brought this appeal and Al-Adahi cross-appealed.

The Authorization for Use of Military Force empowers the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Pub. L. No. 107-40, § 2(a). "[A]ll necessary and appropriate force" includes the power to capture and detain those described in the congressional authorization. *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004). The government may therefore hold at Guantanamo and elsewhere those individuals who are "part of" al-Qaida, the Taliban, or associated forces. *See Awad v. Obama*, No. 09-5351, slip op. at 18 (D.C. Cir. June 2, 2010); *Al-Bihani v. Obama*, 590 F.3d 866, 872, 874-75 (D.C. Cir. 2010).

Whether Al-Adahi fit that description was and is the ultimate issue. The obvious preliminary question is what sort of factual showing does the government, or the detainee, have to make? In this court the question is open. *Al-Bihani* held that the government does not have to prove the legality of detention "beyond a reasonable doubt" or by "clear and convincing evidence." *See* 590 F.3d at 878; *see also Awad*, slip op. at 17-18. *Al-Bihani* also decided that the preponderance-of-the-evidence standard is constitutionally permissible. 590 F.3d at 878. But we have yet to decide whether that standard is required. *Id.* at 878 n.4; *see also Awad*, slip op. at 18 n.2.

The district judge in this case adopted the preponderance standard. Mem. Op. at 5. Other district judges in our circuit have done the same. *See, e.g.*, *Awad*, slip op. at 8. Their rationale is unstated. After *Boumediene*, the district judges met in executive session and decided to coordinate proceedings in Guantanamo habeas cases. *See In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 309, 310 (D.D.C. 2008). On November 6, 2008, the coordinating judge issued a Case Management Order. *In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-442, 2008 WL 4858241 (D.D.C. Nov. 6, 2008). The Order stated, among other things, that the government should bear the burden of proving by a preponderance of the evidence that the petitioner's detention is lawful. Order at 4. In support, the Order cited *Boumediene*. But *Boumediene* held only that the "extent of the showing required of the Government in these cases is a matter to be determined." 128 S. Ct. 2229, 2271.[1]

Boumediene also held that in determining the scope of the writ, "the analysis may [must?] begin with precedents as of 1789, for the Court has said that 'at the absolute minimum' the Clause protects the writ as it existed when the Constitution was drafted and ratified." *Id.* at 2248 (quoting *INS v. St. Cyr*, 533 U.S. 289, 301 (2001)). Yet we are aware of no precedents in which eighteenth century English courts adopted a preponderance standard. Even in later statutory

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[1] Earlier in the opinion the Court seemed to put the burden on the detainee: the Court stated that "the privilege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to 'the erroneous application or interpretation' of relevant law." 128 S. Ct. at 2266 (quoting *INS v. St. Cyr*, 533 U.S. 289, 302 (2001)).

habeas cases in this country, that standard was not the norm. For years, in habeas proceedings contesting orders of deportation, the government had to produce only "some evidence to support the order." *St. Cyr*, 533 U.S. at 306; *Bakhtriger v. Elwood*, 360 F.3d 414, 421 & n.7 (3d Cir. 2004). In such cases courts did not otherwise "review factual determinations made by the Executive." *St. Cyr*, 533 U.S. at 306 (citing *Ekiu v. United States*, 142 U.S. 651, 659 (1892)). In habeas petitions challenging selective service decisions, the government also had the minimal burden of providing "some evidence" to support the decision. *See Eagles v. U.S. ex rel. Sanders*, 329 U.S. 304, 311-12 (1946). Habeas petitions contesting courts martial required the government to show only that the military prisoner had received, in the military tribunal, "full and fair consideration" of the allegations in his habeas petition. *See Burns v. Wilson*, 346 U.S. 137, 142 (1953). And in response to habeas petitions brought after an individual's arrest, the government had to show only that it had probable cause for the arrest. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 125, 130 (1807).

After oral argument, we ordered the parties to file supple mental briefs discussing "what factual showing" (if any) the government must make to justify detaining Al-Adahi. The supplemental briefs we received were not exactly illuminating. The government stated that "in the circumstances currently presented in this Guantanamo habeas litigation," a preponderance standard is "appropriate," Supp. Br. of Appellants at 1, although "a different and more deferential standard may be appropriate in other cases or contexts," Supp.

Reply Br. of Appellants at 2.[2] Al-Adahi readily agreed with the government that the preponderance standard should govern his case. Supp. Br. of Appellee at 2-3. We are thus left with no adversary presentation on an important question affecting many pending cases in this court and in the district court. Although we doubt, for the reasons stated above, that the Suspension Clause requires the use of the preponderance standard, we will not decide the question in this case. As we did in *Al-Bihani*, we will assume arguendo that the government must show by a preponderance of the evidence that Al-Adahi was part of al-Qaida. 590 F.3d at 878 & n.4.

The district court divided the government's evidence into five categories in rough chronological order: Al-Adahi's trip to Afghanistan; his meetings with bin Laden; his stay in an al-Qaida guesthouse; his military training at Al Farouq; and his other, later activities in Afghanistan. Mem. Op. at 13. We will generally follow the court's organization, but before we get to the specifics we need to mention an error that affects much of the district court's evaluation of the evidence. The error stems from the court's failure to

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[2] The government added that "the same [standard of review] may not apply in other cases or contexts involving review of the lawfulness of military detention." Supp. Br. of Appellants at 13-14. The government never explained why there should be a difference. The government also stated that although it was "not here seeking deference to a military tribunal, this Court should make clear that deference to military and intelligence judgments is nonetheless still essential in evaluating the evidence in these cases." *Id.* at 19. Again the government failed to explain why it was not seeking deference to the judgment of the Combatant Status Review Tribunal in this case.

appreciate conditional probability analysis. *United States v. Prandy-Binett*, 5 F.3d 558, 558-60 (D.C. Cir. 1993) (denying rehearing).

"Many mundane mistakes in reasoning can be traced to a shaky grasp of the notion of conditional probability." JOHN ALLEN PAULOS, INNUMERACY: MATHEMATICAL ILLITERACY AND ITS CONSEQUENCES 63 (1988). The key consideration is that although some events are independent (coin flips, for example), other events are dependent: "the occurrence of one of them makes the occurrence of the other more or less likely . . . ." JOHN ALLEN PAULOS, BEYOND NUMERACY: RUMINATIONS OF A NUMBERS MAN 189 (1991). Dr. Paulos gives this example: "the probability that a person chosen at random from the phone book is over 250 pounds is quite small. However, if it's known that the person chosen is over six feet four inches tall, then the conditional probability that he or she also weighs more than 250 pounds is considerably higher." INNUMERACY 63.

Those who do not take into account conditional probability are prone to making mistakes in judging evidence. They may think that if a particular fact does not itself prove the ultimate proposition (*e.g.*, whether the detainee was part of al-Qaida), the fact may be tossed aside and the next fact may be evaluated as if the first did not exist. *Prandy-Binett*, 5 F.3d at 559-60. This is precisely how the district court proceeded in this case: Al-Adahi's ties to bin Laden "cannot prove" he was part of Al-Qaida and this evidence therefore "must not distract the Court." Mem. Op. at 18. The fact that Al-Adahi stayed in an al-Qaida guesthouse "is not in itself sufficient to justify detention." *Id.* at 20. Al-Adahi's attendance at an al-Qaida training camp "is

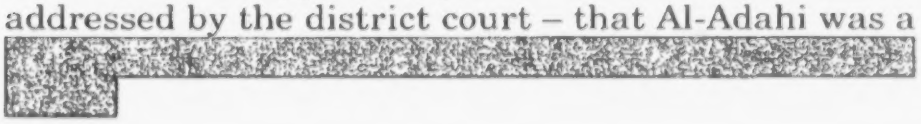
not sufficient to carry the Government's burden of showing that he was a part" of al-Qaida. *Id.* at 25. And so on. The government is right: the district court wrongly "required each piece of the government's evidence to bear weight without regard to all (or indeed any) other evidence in the case. This was a fundamental mistake that infected the court's entire analysis." Br. of Appellants at 42.

Having tossed aside the government's evidence, one piece at a time, the court came to the manifestly incorrect – indeed startling – conclusion that "there is no reliable evidence in the record that Petitioner was a member of al-Qaida and/or the Taliban." Mem. Op. at 41. When the evidence is properly considered, it becomes clear that Al-Adahi was – at the very least – more likely than not a part of al-Qaida. And that is all the government had to show in order to satisfy the preponderance standard. *Awad*, slip op. at 17-18; *see Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622 (1993) (citing *In re Winship*, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring)).

Al-Adahi served in the Yemeni army for two years and was later employed as a security guard at the Yemeni state oil company. In July 2001 he took a six-month leave of absence from his job and left his wife and his two children to travel with his sister Amani to Afghanistan (by way of Pakistan). Amani had entered into an arranged marriage with Riyadh Abd Al-Aziz Almujahid, a Yemeni citizen then residing in Kandahar.

Riyadh was affiliated with al-Qaida. He arranged for Amani's and Al-Adahi's trip to Afghanistan. He

helped them obtain passports from the passport agency in their hometown of Ta'iz. He then sent Al-Adahi to the Yemeni capital city of Sana'a. Al-Adahi was instructed to wear a red jacket and wait outside a specified building for a man he did not know. This man, Ali Yayha, recognized Al-Adahi and gave him two plane tickets and travel money. Yayha also arranged for Al-Adahi and Amani to obtain visas. The government presented evidence that al-Qaida paid for Al-Adahi's and Amani's trip. Al-Adahi admitted that the sort of arrangements that Riyadh made for him and his sister were the same as those al-Qaida used for bringing jihadist recruits to Afghanistan.[3] And he described how Riyadh had obtained Al-Adahi's travel funds from "the Saudi who handled the money" for al-Qaida in Kandahar. That Al-Adahi was an al-Qaida recruit is also supported by a witness's statement – not addressed by the district court – that Al-Adahi was a



Riyadh was "from mujahidin" – that is, those who fought against the Russians and in the Afghan civil war. Many mujahidin frequented the guesthouse Riyadh operated in Kandahar. Al-Adahi stayed at Riyadh's house, located in the same compound. Al-Adahi told interrogators that Riyadh "had achieved a very high status" in al-Qaida.[4] Like Al-Adahi. Riyadh

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[3] Al-Adahi insisted that this was not the impetus for his own travel. He told interrogators that his purpose was to accompany Amani as she traveled to meet her husband.

[4] Al-Adahi told interrogators that Riyadh was a bin Laden bodyguard. But during the habeas proceedings he said he

was described to interrogators as a [redacted] And Al-Adahi admitted that Riyadh's compound was very close to the compound of Mullah Omar, the leader of the Taliban.

Bin Laden hosted the male-only celebration of Riyadh's marriage to Al-Adahi's sister. Bin Laden held the celebration at his compound, which Al-Adahi described as "surrounded by a concrete fence further secured by a large metal gate." Inside the compound, a group of armed guards "draped in munitions belts, grenades, and Kalashnikov rifles" welcomed the wedding guests. At the party, bin Laden gave a speech congratulating Riyadh. Al-Adahi and bin Laden were introduced and sat next to each other during the meal.

Several days later, bin Laden summoned Al-Adahi for another meeting. According to Al-Adahi, at his meeting bin Laden asked him about people he was connected with in Yemen – some of whom were involved in jihad. (The events following the meeting, including Al-Adahi's showing up at the al-Qaida training camp, suggest that more transpired in the meeting than what Al-Adahi related.) In the habeas proceedings, Al-Adahi tried to explain his personal audience with bin Laden on the basis that "meeting with Bin Laden was common for visitors to Kandahar." Mem. Op. at 17. This is, as the government points out, utterly implausible. Al-Adahi's story was "contradicted by the undisputed evidence that in 2001 Usama bin Laden, who knew he was a military target of the

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"doubt[ed]" this was true. Riyadh's brother, Da'ood Al-Ta'zai, was a member of bin Laden's security detail.

United States, had gone into hiding under tight security . . . ." Br. of Appellants at 64.

As to the latter point the district court said nothing, despite the well-settled principle that false exculpatory statements are evidence – often strong evidence – of guilt. *See, e.g.*, *United States v. Penn*, 974 F.2d 1026, 1029 (8th Cir. 1992); *United States v. Meyer*, 733 F.2d 362, 363 (5th Cir. 1984). The court characterized the rest of the evidence about Al-Adahi's meetings with bin Laden as "sensational and compelling" but not "actual, reliable evidence that would justify" detention. Mem. Op. at 41. The court's statements are incomprehensible. On what possible ground can the court say that the evidence on this subject was, on the one hand, "compelling," and yet say, on the other hand, that it was not "actual" and "reliable"? All that comes to mind is the idea that two personal meetings with bin Laden are not enough to prove that an individual is part of al-Qaida. If that is what the court intended, then it was once again engaging in the mistaken reasoning we mentioned in connection with conditional probability analysis. The court rounded off its discussion by characterizing the government's presentation as merely indicating that Al-Adahi had "familial ties to Usama bin Laden," a statement incorrect as a factual matter (Al-Adahi's family ties were to a top aide of bin Laden's) and one that misses the strong thrust of the evidence. The evidence derived its power not only from Al-Adahi's family relationships, but also from his meetings with bin Laden. That close association made it far more likely that Al-Adahi was or became part of the organization.

Rather than grasping this essential point, the district court called the evidence regarding the meetings a distraction – something that should not divert "the Court from its essential focus – the nature of Al-Adahi's own conduct, upon which this case must turn." Mem. Op. at 18. Here again the court's remarks are perplexing. If Al-Adahi's meetings with bin Laden were not his "own conduct," whose conduct were they?

The next event in this narrative greatly strengthened the government's case against Al-Adahi. Not long after his second meeting with bin Laden, Al-Adahi moved to the Al Nebras guesthouse. He said he wanted to go there because it was a gathering place for Muslims, as if that distinguished it from any other place he stayed during his time in Afghanistan. Al Nebras was not just another gathering place: it served as a staging area for al-Qaida recruits en route to the Al Farouq training camp. Al-Adahi was treated like a recruit. Staff at the guesthouse instructed him and the other recruits on how to pack and prepare for their training before taking a bus to Al Farouq. The district court seemed to think that Al-Adahi's stay at the guesthouse – one or two days – was evidence in his favor because it was so brief. But the court failed to take into account that Al Nebras functioned as a way station.

The district court dealt with this evidence in the following way: "the guesthouse evidence is not in itself sufficient to justify detention." Mem. Op. at 20. Note the "not in itself." Again the court erred. Al-Adahi's voluntary decision to move to an al-Qaida guesthouse, a staging area for recruits heading for a military training camp, makes it more likely – indeed, very likely – that Al-Adahi was himself a recruit. There is

no other sensible explanation for his actions. This is why we wrote in *Al-Bihani* that an individual's attendance at an al-Qaida guesthouse is powerful – indeed "overwhelming[]" – evidence that the individual was part of al-Qaida. 590 F.3d at 873 n.2.

Al-Adahi left the guesthouse after a few days and, as expected, entered al-Qaida's Al Farouq training camp. By then it was August 2001. At least eight of the September 11th hijackers had trained at Al Farouq. While Al-Adahi was there, he received training in rocket-propelled grenades, other weapons, and basic physical fitness, as well as some classroom instruction. His statements to interrogators indicated that he had a deep knowledge of the operation of Al Farouq. He described camp leaders in a manner that showed he was familiar with them; he reported details of the camp's training regimen and layout; and he identified the types of weapons used for training. He also knew the training routines of other recruits.

The district court seemed to think it important to determine Al-Adahi's motive for attending the al-Qaida training camp. We do not understand why. Whatever his motive, the significant points are that al-Qaida was intent on attacking the United States and its allies, that bin Laden had issued a *fatwa* announcing that every Muslim had a duty to kill Americans, and that Al-Adahi voluntarily affiliated himself with al-Qaida.

According to Al-Adahi, he stayed at Al Farouq for seven to ten days, and then was expelled for smoking tobacco, a violation of a camp rule. The government introduced evidence casting doubt on Al-Adahi's explanation for leaving the camp. This evidence –

which included Al-Adahi's own statements – showed that trainees expelled from Al Farouq were treated as spies and beaten. Al-Adahi left Al Farouq unharmed. His story was that the camp's instructors treated him gently because they were close to his brother-in-law Riyadh. The government offered another explanation. Al-Adahi did not spend a great deal of time in the camp because he needed little training. He was not a green, untested, recruit. He had served in the Yemeni army, and he had been working as a security guard in Yemen. As to his loyalty to the al-Qaida cause, his sister was married to one of bin Laden's most trusted associates.

The district court reached the following conclusions about Al-Adahi's attendance at Al Farouq: (1) this was "not affirmative evidence that Al-Adahi embraced al-Qaida, accepted its philosophy, and endorsed its terrorist activities"; and (2) his training at Al-Farouq did not show that he "occup[ied] some sort of structured role in the hierarchy of the enemy force" or could "be deemed a member of the enemy's armed forces." Mem. Op. at 24-25 (internal quotation marks omitted).

The court appeared to rule that an individual must embrace every tenet of al-Qaida before United States forces may detain him. There is no such requirement. *See Awad*, slip op. at 19. When the government shows that an individual received and executed orders from al-Qaida members in a training camp, that evidence is sufficient (but not necessary) to prove that the individual has affiliated himself with al-Qaida. *See id.*; *Gherebi v. Obama*, 609 F. Supp. 2d 43, 69 (D.D.C. 2009). Al-Adahi's statements confirm that he received and followed orders while he was at Al Farouq. His

attendance at an al-Qaida military training camp is therefore – to put it mildly – strong evidence that he was part of al-Qaida. In *Al-Bihani*, we stated that if a person stays in an al-Qaida guesthouse or attends an al-Qaida training camp, this constitutes "overwhelming" evidence that the United States had authority to detain that person. 590 F.3d at 873 n.2.

The district court ruled that Al-Adahi did not "receive and execute" orders because he violated the camp rule against smoking tobacco. Mem. Op. at 23, 25. This was error. Al-Adahi's violation of a rule or rules did not erase his compliance with other orders. One would not say that an Army trainee ceased to be part of the Army if he failed to shine his shoes or overslept one morning. Furthermore, there was no evidence that Al-Adahi ever affirmatively disassociated himself from al-Qaida, even though he "accepted his expulsion." *Id.* at 40.

The district court ended its discussion of Al-Adahi's training at Al Farouq with the following statement: Al-Adahi's "admission that he trained at Al Farouq is not sufficient to carry the Government's burden of showing that he was a part, or substantial supporter, of enemy forces." *Id.* at 25. We disagree that this evidence, standing alone, was insufficient. *See Al-Bihani,* 590 F.3d at 873 n.2. In any event, we are sure that the court erred in treating this evidence as if it stood alone.

The court gave similar treatment to the government's proof that Al-Adahi wore the same model of Casio watch the military has linked to al-Qaida and terrorist activity. When Pakistani authorities picked up Al-Adahi they confiscated his watch. A witness

reported seeing him wearing the Casio watch before his capture. The district court threw out these telling facts because, after all, "Casio watches are hardly unique items, even in Afghanistan." Mem. Op. at 34.

It is true that not everyone in Afghanistan with a Casio watch could be identified with al-Qaida. But the evidence did not relate to every such person. It related to a particular individual wearing a Casio model favored by al-Qaida leaders, an individual who had met with bin Laden, had stayed in an al-Qaida guesthouse, and had trained in an al-Qaida camp.

The government also introduced other evidence of Al- Adahi's close connection to the al-Qaida leadership. Al-Adahi had detailed personal knowledge about a group of twelve men who worked for bin Laden. For example, he knew that one man was a trained sniper and could read, write, and speak English; he knew that another spoke Pashtu and Farsi and sent men to Al Farouq for training; and he knew that one "had fat thighs but was quick," owned a four-door pickup truck, fought in Chechnya and Bosnia, and had been with bin Laden in Sudan.

This evidence tended to show Al-Adahi's close relationship with these men and thus strengthened the probability that he was part of al-Qaida. Yet the district court declined to credit the evidence because it was possible that Al-Adahi could have learned the biographical information in some other way, particularly since some of the men were from his hometown in Yemen. Mem. Op. at 35. In so ruling the court committed what a noted historian has called "the fallacy of the possible proof." DAVID HACKETT FISCHER, HISTORIANS' FALLACIES: TOWARD A LOGIC OF

HISTORICAL THOUGHT 53 (1970). "Valid empirical proof requires not merely the establishment of possibility, but an estimate of probability." *Id.* Yet the court spoke only of a possible alternative explanation for Al-Adahi's knowledge of bin Laden's bodyguards. At no point did the court make any finding about whether this alternative was more likely than the government's explanation. But such a "comparative judgment about the evidence" is at the heart of the preponderance standard of proof. *Lindsay v. Nat'l Transp. Safety Bd.*, 47 F.3d 1209, 1213 (D.C. Cir. 1995).

Al-Adahi was in Kabul when the September 11 attacks occurred. He said that he then decided to take a month long vacation and travel throughout the countryside. He said he went to Kabul because he was bored staying in Kandahar. When the United States began its military campaign in Afghanistan on October 7, 2001, Al-Adahi claimed he was still in Kabul. About a week and a half after the bombing began, he left for Khost, Afghanistan, where he stayed in a mosque for about two weeks. He said he then left Khost to return to Kandahar to search for his sister. He spent another two to three weeks in Kandahar, including two or three days in a hospital recuperating from injuries to his arm and side. Al-Adahi said he sustained his injuries in a motorcycle accident. He offered different versions of how the accident occurred: he hit a speed bump on his way to the market; he crashed into a cart as he was riding around Kandahar; he fell off his motorcycle while attempting to flee the United States bombing; he crashed trying to avoid a small car.

Al-Adahi left the hospital for Pakistan on a bus carrying wounded Arabs and Pakistanis. At one point in his interrogation, Al-Adahi described these fourteen

men as Taliban soldiers; but he testified at the habeas proceeding that he learned this only from a newspaper article.

From Al-Adahi's movements in Afghanistan, his injuries, his shifting versions of his supposed motorcycle accident, and his capture on a bus loaded with wounded Taliban fighters, the government infers that Al-Adahi was complying with "bin Laden's order to persist in the jihad" after the American attacks. Br. of Appellants at 21. The district court, once again treating items of evidence in isolation, pronounced that "there is no evidence that [Al-Adahi] sought to join or was already part of a band of fighters fleeing the region." Mem. Op. at 39. The court was wrong, and clearly so. Al-Adahi's capture on a bus carrying only himself and wounded Taliban fighters constituted such evidence, as did his injuries, his movements in the country, and the contradictions contained in his explanations. We do not say that any of these particular pieces of evidence are conclusive, but we do say that they add to the weight of the government's case against Al-Adahi and that the district court clearly erred in tossing them aside. *See Awad*, slip op. at 14-1 5; *Prandy-Binett*, 5 F.3d at 559-60.

One of the oddest things about this case is that despite an extensive record and numerous factual disputes, the district court never made any findings about whether Al-Adahi was generally a credible witness or whether his particular explanations for his actions were worthy of belief. The court's omissions are particularly striking in light of the instructions in al-Qaida's training manuals for resisting interrogation. For those who belong to al-Qaida, "[c]onfronting the interrogator and defeating him is part of your jihad."

To this end al-Qaida members are instructed to resist interrogation by developing a cover story, by refusing to answer questions, by recanting or changing answers already given, by giving as vague an answer as possible, and by claiming torture. Put bluntly, the instructions to detainees are to make up a story and lie. Despite this the district court displayed little skepticism about Al-Adahi's explanations for his actions. To the extent the court expressed any doubts, it addressed them to the government's case and did so on the mistaken view that each item of the government's evidence needed to prove the ultimate issue in the case.

We could go on, but what we have written thus far is enough to show that the district court clearly erred in its treatment of the evidence and in its view of the law. *Cf. Barhoumi v. Obama*, No. 09-5383, slip op. at 12-13 (D.C. Cir. June 11, 2010); *Awad*, slip op. at 17. The court's conclusion was simply not a "permissible view[] of the evidence." *See Anderson v. City of Bessemer City, N. C.*, 470 U.S. 564,573-74 (1985). And it reached this conclusion through a series of legal errors, as we have discussed. We have already mentioned the suggestion in Al-Bihani that attendance at either an al-Qaida training camp or an al-Qaida guesthouse "would seem to overwhelmingly, if not definitively, justify" detention. 590 F.3d at 873 n.2. The evidence against Al-Adahi showed that he did both – stayed at an al-Qaida guesthouse and attended an al-Qaida training camp. And the evidence showed a good deal more, from his meetings with bin Laden, to his knowledge of those protecting bin Laden, to his wearing of a particular model of Casio watch, to his incredible explanations for his actions, to his capture on a bus carrying wounded Arabs and Pakistanis, and

so on. One of the most damaging and powerful items of evidence against him is classified.[5] In all there can be no doubt that Al-Adahi was more likely than not part of al-Qaida. We therefore reverse and remand with instructions to the district court to deny Al-Adahi's petition for a writ of habeas corpus.[6]

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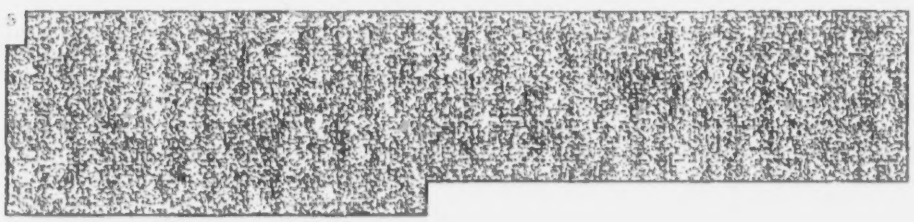
[5] 

[6] Al-Adahi filed a cross-appeal. He argues that the district court had no authority to admit hearsay bearing on his habeas petition. We rejected that argument in *Al-Bihani*, 590 F.3d at 879, and again in *Awad*, slip op. at 11. *Al-Bihani* also forecloses Al-Adahi's argument that admitting hearsay violated his Sixth Amendment right of confrontation. 590 F.3d at 879. The district court did not abuse its discretion by not ruling separately on the reliability of each item of hearsay, despite Al-Adahi's claim that the case management order required it to do so. *Barhoumi*, slip op. at 9-10. His claim that statements he made outside the presence of counsel should be suppressed also fails: Al-Adahi cites no precedent extending the *Miranda v. Arizona*, 384 U.S. 436 (1966), line of cases beyond the criminal context. *Cf.* Mem. Op. at 21 n.14. As we noted in *Al-Bihani*, these constitutional habeas proceedings are not subject to all the protections given to defendants in criminal prosecutions. 590 F.3d at 876. Al-Adahi points to the Army Rules of Professional Responsibility as also requiring suppression of his ex parte statements, but he waived this argument by failing to raise it until his cross-appeal reply brief. *See Rollins Environmental Services (NJ), Inc. v. EPA*, 937 F.2d 649, 652 n.2 (D.C. Cir. 1991).

Al-Adahi also claims his statements should be suppressed pursuant to the Third Geneva Convention. Even if the Convention had been incorporated into domestic U.S. law and even if it provided an exclusionary rule, Congress has provided explicitly that the Convention's provisions are not privately enforceable in

So Ordered.

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habeas proceedings. *See* Military Commissions Act of 2006 § 5, Pub. L. No. 109-366, 120 Stat. 2631-32; *Noriega v. Pastrana*, 564 F.3d 1290, 1296-97 (11th Cir. 2009); *Boumediene v. Bush*, 476 F.3d 981, 988 n.5 (D.C. Cir. 2007).

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5333 **September Term, 2009**

FILED ON: JULY 13, 2010

MOHAMMED AL ADAHI, DETAINEE, CAMP DELTA, GUANTANAMO BAY NAVAL STATION, GUANTANAMO BAY, CUBA AND MIRIAM ALI ABDULLAH AL-HAJ, NEXT FRIEND OF MOHAMMED AL-ADAHI,	)
APPELLEES/CROSS-APPELLANTS	)
V.	)
BARACK OBAMA, PRESIDENT OF THE UNITED STATES, ET AL.,	)
APPELLANTS/CROSS-APPELLEES	)

Consolidated with 09-5339

Appeals from the United States District Court
for the District of Columbia
(No. 1:05-cv-00280-GK)

Before: HENDERSON and KAVANAUGH, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in these causes is hereby reversed and remanded with instructions to deny appellant's petition for writ of habeas corpus, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Michael C. McGrail
Deputy Clerk

Date: July 13, 2010

Opinion for the court filed by Senior Circuit Judge Randolph.

APPENDIX B

UNCLASSIFIED//FOR PUBLIC RELEASE.

2 [redacted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 05-280 (GK)

FILED WITH THE
COURT SECURITY OFFICER

CSO: /s/
DATE: 8/17/09

MOHAMMED AL-ADAHI, et al.,

Petitioners,

v.

BARACK H. OBAMA, et al.,

Respondents.

MEMORANDUM OPINION

Petitioner Mohammed Al-Adahi ("Al-Adahi" or "the Petitioner") has been detained since 2002 at the United States Naval Base at Guantanamo Bay Cuba.

Respondents ("the Government") argue that his detention is justified under the Authorization for the Use of Military Force, Pub. L. No. 107-40 § 2(a), 115 Stat. 224, 224 (2001) ("AUMF"), which grants the Executive the power to detain individuals engaged in certain terrorist activities. The Petitioner disagrees, and has, along with four other petitioners, filed a petition for a writ of habeas corpus [Dkt. No. 1].

The matter is before the Court on Cross-Motions for Judgment on the Record [Dkt. Nos. 373 and 379].[1] Upon consideration of the Motions, the Oppositions, extensive oral argument and accompanying exhibits, and the entire record herein, Al-Adahi's habeas corpus petition and Motion are hereby **granted.**

I. BACKGROUND

A. Procedural History

Petitioner filed his habeas corpus petition on February 7, 2005. After filing, there was extensive preliminary litigation regarding the Court's jurisdiction to entertain detainees' petitions, the applicability of various statutes, and the appropriate procedures to be used.

After more than six years of litigation, the most important legal issue was resolved by the Supreme Court in Boumediene v. Bush, 553 U.S. _, 128 S.Ct.

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[1] Two of the five Petitioners, [redacted] and [redacted] did not file Motions for Judgment on the Record. Two others, [redacted] did file such a Motion, but their cases were stayed during Al-Adahi's Hearing. Order (June 25, 2009) [Dkt. No. 430].

2229 (2008). The Court ruled that detainees at Guantanamo Bay, none of whom are citizens of the United States, are entitled to bring habeas petitions under Article I of the Constitution, and that the federal district courts have jurisdiction to hear such petitions.

The Court did not define what conduct the Government would have to prove, by a preponderance of the evidence, in order to justifiably detain individuals -- that question was left to the District Courts. Id. at 2240 ("We do not address whether the President has the authority to detain these petitioners nor do we hold that the writ must issue. These and other questions regarding the legality of the detention are to be resolved in the first instance by the District Court."). Nor did the Supreme Court lay down specific procedures for the District Courts to follow in these cases.

Boumediene was, however, definitive on at least two points: first, that the detainees are entitled to a prompt hearing, 128 S.Ct. at 2275 ("The detainees in this case are entitled to a prompt habeas corpus hearing."), and second, that the District Courts are to shape the contours of those hearings, id. at 2276 (finding that balancing protection of the writ and the Government's interest in military operations, "and the other remaining questions [,] are within the expertise and competence of the District Court to address in the first instance.").

In an effort to provide the prompt hearings mandated by the Supreme Court, many of the judges in this District agreed to consolidate their cases before former Chief Judge Thomas Hogan, for purposes of

streamlining procedures for, and management of, the several hundred petitions filed by detainees. See Order (July 1, 2008) [Civ. No. 08-442, Dkt. No. 1]. On November 6, 2008, after extensive briefing from Petitioners' counsel and the Government, Judge Hogan issued a Case Management Order ("CMO") to govern the proceedings. This Court adopted, in large part, the provisions of that Order, while modifying it somewhat, as noted in Appendix A to Dkt. No. 283.

Much pre-hearing activity has taken place under this Court's Case Management Order. The Government has filed the exculpatory evidence, automatic discovery, and additional discovery required under the CMO. The Government filed its Factual Return for Al-Adahi on August 1, 2005, and amended it on September 29, 2008. The Petitioner responded by filing Traverses on July 3, 2008, July 7, 2008, and October 10, 2009. After a period of extensive discovery, both parties filed substantial briefs accompanied by extensive exhibits.

On April 10, 2009, the Court set June 22, 2009, as the date for the "merits hearing" on the Cross-Motions for Judgment on the Record for all three Petitioners who planned to go forward in challenging their detention. Al-Adahi's case, including the Petitioner's live direct and cross-examination on June 23, 2009, was presented to the Court over a four-day period. On June 25, Petitioners [redacted] instructed their counsel to not proceed with litigating their Motions. [redacted] cases were then stayed until October 1, 2009. Order (June 25, 2009).

II. STANDARD OF REVIEW

The Government bears the burden of establishing that detention is justified. See Boumediene, 128 S.Ct. at 2270; Hamdi, 542 U.S. 507, 533-34 (2004). It must do so by a preponderance of the evidence. Order, Appendix A at § II.A (Feb. 12, 2009) [Dkt. No. 283-2]; see also Basardh v. Obama, 612 F. Supp. 2d 30, 35 n.12 (D.D.C. 2009).

Initially, the Government took the position that Article II of the Constitution and the AUMF granted the President the authority to detain individuals. See Gherebi v. Obama, 609 F. Supp. 2d 43, 53 n.4 (D.D.C. 2009). The Government asserted, "[a]t a minimum, . . . the ability to detain as enemy combatants those individuals who were part of, or supporting, forces engaged in hostilities against the United States or its coalition partners and allies." Resp't's Statement of Legal Justification For Detention at 2 [Dkt. No. 205].

Since the change in administration, the Government has abandoned Article II as a source of detention authority, and relies solely on the AUMF. Gherebi, 609 F. Supp. 2d at 53 n.4. Further, it no longer uses the term "enemy combatant." Its refined position is:

> [t]he President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida

> forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.

Resp't's Revised Mem. Regarding the Gov's Detention Authority Relative to Detainees Held at Guantanamo Bay at 3 [Dkt. No. 306].

In Gherebi, Judge Reggie B. Walton of this District Court ruled that the Government has the authority to detain individuals who were part of, or substantially supported, al-Qaida and/or the Taliban, provided that those terms "are interpreted to encompass only individuals who were members of the enemy organization's armed forces, as that term is intended under the laws of war, at the time of their capture." Gherebi, 609 F. Supp. 2d at 70-71.

In Hamlily v. Obama, 616 F. Supp. 2d 63 (D.D.C. 2009), Judge John Bates of this District Court concluded that under the law of war, the Government has the authority to detain individuals who were "part of . . Taliban or al Qaida forces," or associated forces. Id. at 74. The court went on to rule that the Government does not have the authority to detain those who are merely "substantial supporters" of those groups. Id. at 76. While the Court has great regard for the scholarship and analysis contained in both decisions, the Court concludes that Judge Walton's

opinion presented a clearer approach, and therefore will adopt his reasoning and conclusion.[2]

III. ANALYSIS

A. Evidentiary Presumptions

As a preliminary matter, some attention must be given to the nature of the evidence that has been presented in this case, and how the Court, as fact-finder, will go about evaluating that evidence. In attempting to meet its burden, the Government has provided evidence in the form of classified intelligence and interview reports that it believes justify the Petitioner's detention. The reports contain the statements of Petitioner, as well as statements made by other detainees, that the Government argues demonstrate the Petitioner's status as a member or substantial supporter of al-Qaida and/or the Taliban.[3]

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[2] The Court agrees with Judge Bates' comment that the determination of who was a "part of" the Taliban/al-Qaida, under Judge Walton's approach, rests on a highly individualized and case-specific inquiry; as a result, the "concept [of substantial support] may play a role under the functional test used to determine who is 'part of' a covered organization," and the difference in the two approaches "should not be great." Hamlily, 616 F. Supp. 2d at 76.

[3] Petitioner argues that the Government's evidence should be excluded under the Geneva Conventions, because the evidence was collected in violation of various articles of the Third Geneva Convention. Pet.'s Resp. to Resp't's Mot. for J. and Supporting Mem. at 4 ("Pet.'s Opp'n") [Dkt. No. 402]. Parties briefed this issue further in the weeks following the Merits Hearing [Dkt. Nos. 435, 441, and 442]. Assuming for the moment that the evidence can be admitted consistent with the Geneva Conventions, the Court's

The Government requested that a rebuttable presumption of authenticity be granted to all the exhibits it intends to introduce.[4] Petitioner objected to this request. See Pets.' Joint Opp'n to the Government's Memo. and Supplement Regarding Presumptions, Hearsay and Reliability of Intelligence Information at 3-10 ("Pets.' Presumptions Memo.") [Dkt. No. 400]; Pet. Mohammed Al-Adahi's Brief in Support of Entry of Judgment at 3 ("Pet.'s Mot.") [Dkt. No. 373]. Given the Government's representations that the specific documents included in its case against Petitioner, as well as the documents provided to Petitioner's counsel in discovery, have all been maintained in the ordinary course of business, the Court will presume, pursuant to Fed. R. Evid. 803(6), that its documents are authentic. As provided for in the Case Management Order, the Government's exhibits will be granted a rebuttable presumption of authenticity and will be deemed authentic in the absence of any rebuttal evidence to the contrary.

The Government has also requested that a rebuttable presumption of accuracy be granted to all the exhibits it intends to introduce. The Petitioner objected to this request as well. See Pets.'

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consideration of that evidence leads to the conclusion, as discussed below, that Al-Adahi is not justifiably detained. Therefore, it need not and does not reach the question of whether the interrogation reports must be excluded.

[4] Ordinarily, "the requirement of authentication requires that the proponent, who is offering a writing into evidence as an exhibit, produce evidence sufficient to support a finding that the writing is what the proponent claims it to be." 2 K. Broun, McCormick on Evidence § 221 (6th ed.).

Presumptions Memo. at 3-10. This request is denied for several reasons.

First, there is absolutely no reason for this Court to presume that the facts contained in the Government's exhibits are accurate. Given the extensive briefing and oral argument presented by counsel during the discovery phase of this case, as well the exhibits submitted at the merits trial, it is clear that the accuracy of much of the factual material contained in those exhibits is hotly contested for a host of different reasons ranging from the fact that it contains second-level hearsay to allegations that it was obtained by torture to the fact that no statement purports to be a verbatim account of what was said.

Second, given the fact that this is a bench trial, the Court must, in any event, make the final judgment as to the reliability of these documents, the weight to be given to them, and their accuracy. Those final judgments will be based on a long, nonexclusive list of factors that any fact-finder must consider, such as: consistency or inconsistency with other evidence, conditions under which the exhibit and statements contained in it were obtained, accuracy of translation and transcription, personal knowledge of declarant about the matters testified to, levels of hearsay, recantations, etc.[5]

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[5] While the Supreme Court did suggest in Hamdi that a rebuttable presumption "in favor of the Government's evidence" might be permissible, 542 U.S. at 534, it did not mandate it. In Boumediene, the Court clearly left it to the District Courts to craft appropriate procedures. Boumediene, 128 S.Ct. at 2272.

Denial of the Government's request for a rebuttable presumption of accuracy does not mean, however, that the Government must present direct testimony from every source, or that it must offer a preliminary document-by-document foundation for admissibility of each exhibit. As the Supreme court noted in Hamdi, 542 U.S. at 533-34, hearsay may be appropriately admitted in these cases because of the exigencies of the circumstances.

Finally, while parties always retain the right to challenge the admissibility of evidence, the Court will be guided by the Federal Rules of Evidence, in particular Rule 402, providing that "[a]ll relevant evidence is admissible." Once all evidence is admitted into the record, the Court will then, in its role as fact-finder, evaluate it for credibility, reliability, and accuracy in the manner described above.

B. Mosaic Theory

The Government advances several categories of allegations which, in its view, demonstrate that the Petitioner was detained lawfully. Above all, its theory is that each of these allegations -- and even the individual pieces of evidence supporting these allegations -- should not be examined in isolation. Rather, "[t]he probity of any single piece of evidence should be evaluated based on the evidence as a whole," to determine whether, when considered "as a whole," the evidence supporting these allegations comes together to support a conclusion that shows the Petitioner to be justifiably detained. Gov's Mot. For J. Upon the Administrative R. and Mem. in Supp. at 6 (internal citation omitted) ("Gov's Mot.") [Dkt. No. 379]. While the Government avoids an explicit

adoption of the mosaic theory, it is, as a practical matter, arguing for its application to the evidence in this case. Cf. Ali Ahmed v. Obama, 613 F. Supp. 2d 51, 55-56 (D.D.C. 2009).

The Court understands from the Government's declarations, and from case law,[6] that use of this approach is a common and well-established mode of analysis in the intelligence community. This may well be true. Nonetheless, at this point in this long, drawn-out litigation the Court's obligation is to make findings of fact and conclusions of law which satisfy appropriate and relevant legal standards as to whether the Government has proven by a preponderance of the evidence that the Petitioner is justifiably detained. The kind and amount of evidence which satisfies the intelligence community in reaching final conclusions about the value of information it obtains may be very different from, and certainly cannot determine, this Court's ruling.

Even using the Government's theoretical model of a mosaic, it must be acknowledged that the mosaic theory is only as persuasive as the tiles which compose it and the glue which binds them together -- just as a brick wall is only as strong as the individual bricks which support it and the cement that keeps the bricks in place. Therefore, if the individual pieces of a mosaic are inherently flawed or do not fit together, then the

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[6] See, e.g., McGehee v. Casey, 718 F.2d 1137, 1149 (D.C. Cir. 1983) (recognizing that the "mosaic-like nature of intelligence gathering" requires taking a "broad view" in order to contextualize information) (internal citations and quotations omitted).

mosaic will split apart, just as the brick wall will collapse.

A final point must be kept in mind. One consequence of using intelligence reports and summaries in lieu of direct evidence is that certain questions simply cannot be answered, i.e., there are no deposition transcripts to consult and few if any witnesses are available for cross-examination. Despite the fact that Petitioner testified via video-conference from Guantanamo Bay, and was cross-examined by the Government,[7] sizeable gaps may appear in the record and may well remain unfilled; each party will attempt to account for these deficiencies by positing what they think are the most compelling logical inferences to be drawn from the existing evidence. Accordingly, that existing evidence must be weighed and evaluated as to its strength, its reliability, and the degree to which it is corroborated. In any event, the Government always bears the ultimate burden of showing by a preponderance of the evidence that Petitioner's detention is lawful. Just as a criminal defendant need

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[7] Petitioner's testimony was closed to the public. However, the Government was ordered to conduct expedited classification reviews of the testimony transcript so that it could be released on the public docket. Order (June 19, 2009) [Dkt. No. 423]. The Government complied, and the transcripts were made available to the public on June 26, 2009 [Dkt. No. 431]. The Government also was ordered to videotape the testimony and maintain a redacted copy of the tape. Order (June 19, 2009). On July 23, 2009, the Government provided notice that it did not comply with this order, citing "oversight and miscommunication" as reasons that the testimony was not videotaped. Notice Regarding the Court's June 19, 2009 Order (July 23, 2009) [Dkt. No. 446]. The following day, Petitioner filed a Motion for Sanctions [Dkt. No. 447], which is pending at this time.

not prove his innocence, a detainee need not prove that he was acting innocently. In sum, the fact that the Petitioner may not be able to offer neat answers to every factual question posed by the Government does not relieve the Government of its obligation to satisfy its burden of proof.

C. Government Allegations

In narrowing the issues for trial, parties focused on six broad factual areas that were in dispute. The Court then heard arguments on the existence and extent of (1) Petitioner's familial ties, (2) his stay at al-Qaida and/or Taliban guesthouses, (3) his military training at Al Farouq and service as an instructor there, (4) his employment as a bodyguard for Usama Bin Laden, (5) his other activities in Afghanistan (including his escape from the country and later arrest), and, finally, (6) the overall credibility of Petitioner's version of his travels from his home in b(1) to Pakistan, Afghanistan, and his flight back to Pakistan.

1. Familial Ties and Travel to Afghanistan

There is no question that the record fully supports the Government's allegation that Petitioner had close familial ties to prominent members of the jihad community in Afghanistan. JE 28;[8] JE 55; JE 18; JE 40; Tr. at 11, 17 (June 23, 2009). b(1), b(6)
b(1), b(6)

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[8] Parties submitted two volumes of Joint Exhibits, which comprise the vast majority of evidence presented during trial. Unless otherwise indicated, citations to "JE" refer to the universe of Joint Exhibits.

b(1), b(6) Tr. at 11 (June 23, 2009). Although the Government alleges that Al-Adahi has presented inconsistent and therefore unreliable reasons for this trip, the record shows that b(1), b(6)
b(1), b(6)
b(1), b(6) Tr. at 22 (June 23, 2009); JE 13 (citing Amani's back problems and visit to husband as reasons for trip); JE 15 at 1 (same); JE 33 at 2, 5 b(1)
b(1) . The two reasons are hardly inconsistent with each other.

From her home in b(1), b(6) had entered into an arranged marriage with b(1), b(6) . She and her brother, Petitioner, then traveled to Kandahar to unite the recently wedded couple and to attend a celebration of the marriage.[9] Tr. at 9 (June 24, 2009).

b(1), b(6) appears to have been a prominent man in Kandahar. b(1), b(6)
b(1), b(6)
b(1), b(6) JE 28 at 3; Tr. at 15-16 (June 24, 2009) (Al-Adahi "believe[d]" that 6 fought the Soviets, but was not told that by 6 himself). The Government alleges that 6 was involved at a high level in al-Qaida operations, b(1), b(6)
b(1), b(6) see JE 18 at 4-5; JE 40 at 1 (alleged to be Bin Laden bodyguard); Gov. Mot. at

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[9] The celebration attended by Petitioner Bin Laden's house was for men only. The women celebrated at another venue. Tr. at 11 (June 24, 2009).

9-10.[10] Further, [redacted] is described as being "among the jihad personnel from [redacted]" JE 55 at 4. It is not clear if this description is based on statements from [redacted] or [redacted]. Al-Adahi "doubts" that [redacted] was a Bin Laden bodyguard, but acknowledges that he was "from mujahidin [sic]." Tr. at 21 (June 23, 2009).

[redacted], b(6)
[redacted], b(6)
[redacted], b(6)
b(1), b(6)
[redacted], b(6)
[redacted], b(6)

The Government suggests that their travel pattern mimics that of other al-Qaida-recruited jihadists who were traveling into Afghanistan to participate in battle against the United States. Gov. Mot. at 11 (describing arrangements as "highly unusual" and suggestive of "a degree of secrecy and operational tradecraft"); id. at

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[10] [redacted], b(2), b(6)
[redacted], b(2), b(6)
[redacted], b(2), b(6) b(1), b(6)
[redacted], b(6)

he is described as "one of the jihad personnel," JE 55 at 2. Further, [redacted], b(2), b(6)
[redacted], b(2), b(6) JE 40 at 1; JE 18 at 4-5.

[11] The exact details of this exchange are not totally clear, but the overall narrative remains the same. See Tr. at 14-15 (June 23, 2009); JE 28 at 4; JE 33 at 3.

14-15. To buttress its argument, it points to the b(1), b(6)

b(1), b(6) The Government infers that these arrangements indicate Al-Adahi's willingness to be recruited by al-Qaida, as well as b(1), b(6) status as a member of that organization. Gov. Mot. at 11, 13.

The inference that b(1), b(6) was affiliated with al-Qaida is strongly supported by the circumstances of the wedding celebration that took place. It is undisputed that Usama Bin Laden, the founder and leader of al-Qaida, hosted and attended 6 wedding reception in Kandahar, Tr. at 11 (June 24, 2009); JE 51 at 2-3. At the celebration at Bin Laden's compound, as he was escorted around the event by a friend of 6 Al-Adahi was introduced briefly to Bin Laden. Tr. at 11 (June 24, 2009); Tr. at 17, 20-21 (June 23, 2009); JE 51 at 4.

A few days later, Al-Adahi met Bin Laden again and the two chatted briefly about religious matters in Yemen. Tr. at 20-21 (June 23, 2009); JE 49 at 4. In his testimony, the Petitioner insisted that such a meeting with Bin Laden was common for visitors to Kandahar. Tr. at 24-25 (June 24, 2009); JE 49 at 5. The Government interprets the access to Bin Laden, as well as the relationship to b(1), b(6) and b(1), b(6) brother, an alleged bodyguard for Bin Laden, as part of the evidence that "Al-Adahi was part of the inner circle of the enemy organization al-Qaida." Resp't's Opp'n to Pet. (ISN 33) Mohammed Al-Adahi's Br. in Supp. of Entry of J. at 3 ("Gov. Opp'n") [Dkt. No. 408].

The Government concedes that Al-Adahi's family situation is not, in and of itself a basis for his detention. What the Government argues is that the existence of these family connections to Bin Laden strengthen other, more serious allegations, such as Petitioner's training and service as a bodyguard. These connections, according to the Government, demonstrate that Al-Adahi was an al-Qaida insider whose brother-in-law was facilitating his rise up the ranks of the al-Qaida organization.

While it is true that Petitioner's familial ties to Usama Bin Laden may suggest that he had access to the leadership of al-Qaida, such associations cannot prove that he was a member of al-Qaida's "armed forces." Gherebi, 609 F. Supp. 2d at 70-71. Accordingly, his relationship to b(1), b(6) and attendance at the wedding must not distract the Court from its appropriate focus--the nature of Al-Adahi's own conduct, upon which this case must turn.

2. Guesthouse Stay

The Government claims that Al-Adahi stayed at al-Qaida and/or Taliban guesthouses during his stay in Afghanistan in 2001. It points specifically to his admission that he stayed at the al-Nebras guesthouse for one night. Tr. at 23 (June 23, 2009); JE 27; JE 52. In addition, the Government points to Al-Adahi's own statements in arguing that b(1), b(6) home was a guesthouse that sheltered mujahideen and men involved in Al-Wafa. Gov. Mot. at 12-13; JE 28 at 3; JE 16 at 1; JE 19 at 2. Al-Wafa was a Specially Designated Global Terrorist Entity that ostensibly operated as a charity. Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 23, 2001); JE 6 at 1.

Petitioner counters that [redacted] home was not identified by the Government in its background declaration as being a guesthouse operated by either al-Qaida or the Taliban. Cf. JE 5. Significantly, there is credible evidence in the record demonstrating that Petitioner stayed in [redacted] home, which appears to have been a separate structure from any guesthouse that [redacted] may have operated. JE 27 at 3. [redacted] JE 33 at 4.

Other than this admission about al-Nebras and the argument about his brother-in-law's home, the Government points only to the [redacted] JE 39 at 3. The allegation was based on [redacted][12] Id. at 1, 3. [redacted] Id. at 3.

The guesthouse evidence, like that of Al-Adahi's family connections, is offered as a tile in the Government's mosaic. The Government recognizes that in this case the guesthouse evidence is not in itself sufficient to justify detention. The Court credits Al-Adahi's repeated admissions of his one-night stay at

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[12] The first page of the interrogation report containing this identification indicates that [redacted] JE 39 at 1. Al-Adahi is [redacted] On page three of the report, [redacted] goes on to describe the person [redacted] marked "[ISN 33]." Id. at 3. [redacted] is not mentioned again in the rest of the report. This confusion over ISN numbers [redacted]

al-Nebras, but cannot rely on b(1), b(6) vague and uncorroborated statement about his meeting with Al-Adahi at an unnamed Kandahar guesthouse and his questionable b(1) identification of Al-Adahi.[13]

3. Al Farouq

The Government's central accusation -- that Al-Adahi attended al-Qaida's Al Farouq training camp in or around August of 2001 -- is not disputed by Petitioner; in fact, he admitted to it during his testimony. Tr. at 23-24 (June 23, 2009) (admitting attendance at Al Farouq for one week). The critical issues that divide parties are the significance of Petitioner's brief attendance, and whether or not Al-Adahi served as an instructor at Al Farouq.

a. Attendance at Al Farouq

Again, there is no dispute that Al-Adahi trained at Al Farouq for somewhere between seven and ten days. Id.; JE 26 at 4 (ten days); JE 52 at 2 (about seven days); JE 27 at 3 (seven days). During several

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[13] b(1), b(6) credibility has been called into question by this Court and other courts in this District. See Ali Ahmed v. Obama, 05-cv-1678, classified mem. op. at 13-14 (D.D.C. May 4, 2009) [Dkt. No. 211]. On May 22, 2009, the Government submitted a memorandum and voluminous appendix of exhibits in an effort to rehabilitate b(1), b(6) reliability as a witness. The Court reviewed the Government's submission, and agrees that b(1), b(6) cannot be written off as unreliable in all instances; however, his troublesome record [illegible] 5

interrogations,[14] Al-Adahi gave detailed descriptions of the training regimen and layout of the camp, identified other detainees as trainers (including b(1), b(6) , JE 26 at 5; JE 52 at 2, and admitted that he received training while there.

His motives for going to Al Farouq cannot be determined with the same certainty. In his testimony, Al-Adahi claims that he sought general weapons

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[14] Petitioner's counsel argues that all ex parte statements made by Petitioner must be excluded from the record. Pet.'s Mot. at 18 -20. They maintain that because Petitioner was represented by counsel as of February 7, 2005, and all interrogations after that date were not consented to by counsel, Constitutional and ethical rules require that evidence from those interrogations be excluded. Id.

The Court concludes that the ex parte statements are admissible for the following reasons. First, under Supreme Court and Court of Appeals precedent, only defendants in the criminal context can claim Sixth Amendment protections. Montejo v. Louisiana, 129 S.Ct. 2079, 2085 (2009) (stating that Sixth Amendment "guarantees a defendant the right to have counsel at all 'critical' stages of the criminal proceedings.") (emphasis added); United States v. Sutton, 801 F.2d 1346, 1365 (D.C. Cir. 1986) (finding that right to counsel attaches "only after the initiation of 'adversary judicial criminal proceedings,' e.g., formal charge, preliminary hearing, indictment, information, or arraignment."). Petitioner is not involved in a criminal proceeding, and thus the Sixth Amendment does not apply. Cf. Coleman v. Balkcom, 451 U.S. 949, 954 (1981) (Marshall, J., dissenting from denial of certiorari) .

Second, Petitioner argues that the Government's conduct amounts to a violation of ethical rules. The interrogators in this case were not the attorneys representing the Government in habeas litigation; rather; they were agents conducting an investigation. There is no evidence that Government attorneys controlled or guided interrogations of Al-Adahi. Consequently, there were no ethical violations. See United States v. Lemonakis, 485 F.2d 941, 956 (D.C. Cir. 1973); Sutton, 801 F.2d at 1366.

training and "Islamic education." Tr. at 23-24 (June 23, 2009). After having attended his sister's wedding reception, and with time off from his job in b(1) and having no particular plans about what to do next, he portrayed himself as being willing to explore the region and try something new. The Government attempted to link Al-Adahi's attendance to his alleged ideological conviction in jihad against the United States. However, Al-Adahi resisted being portrayed as a supporter of war against America, and repeatedly denied "support[ing] these acts [of jihad]." Tr. at 19 (June 24, 2009); see id. at 17-21.

Al-Adahi claims that he pursued training at Al Farouq to satisfy "curiosity" about jihad, and because he found himself in Afghanistan with idle time. JE 26 at 5; cf. Tr. at 22-23 (June 23, 2009) (stating that he did not know about Al Farouq until he arrived at al-Nebras, and attended camp to learn about Islam and weapons). It is important to observe that Al-Adahi's understanding of the term "jihad" does not seem to equate to war against the United States. See Tr. at 21 (June 23, 2009). For instance, in a b(1)

b(1) JE 26 at 5; see JE 28 at 3 (where Petitioner explains mujahideen to mean "those that fought against the Russians and then later fought with the Taliban against Massoud).

Petitioner insists that he did not attend the camp to become part of jihad, and that the circumstances of his departure support this position. After seven to ten days at Al Farouq, the camp leaders expelled Al-Adahi for failing to comply with the rules. Tr. at 24 (June 23, 2009); JE 52 at 2. b(1)

JE 26 at 4-5. In Petitioner's view, any affiliation with or substantial support of al-Qaida that could have been established based on his attendance at Al Farouq was destroyed by this expulsion. Pet.'s Mot. at 44.

The Government counters that the circumstances of his departure, in addition to his attendance, actually help justify detention. Al-Adahi was ordered to leave, and returned to Kandahar to stay with b(1), b(6) again. He did so despite the fact that, according to Al-Adahi himself, individuals expelled from Al Farouq for rules violations were generally considered spies, and severely punished. JE 26 at 4; JE 52 at 2-3. Suspected spies, the Government infers from another detainee's experiences, were treated harshly. See Al Ginco v. Obama, No. 05-cv-1310, 2009 WL 1748011, at *3 (D.D.C. June 22, 2009) (describing Government's concession that suspected spy was imprisoned and tortured by Taliban). In this case, Al-Adahi was spared punishment because of his relationship with his brother-in-law b(1), b(6) See JE 52 at 2.

The Government argues that the clemency extended to Al-Adahi demonstrates that he continued to be a member of the organization, and was being protected by his powerful brother-in-law b(1), b(6) See JE 52 at 2 (reporting that prior to expelling Petitioner, camp leadership notified b(1), b(6) Al-Adahi, it notes, was even permitted to return to Kandahar and stay with b(1), b(6) who allegedly housed al-Qaida fighters. This, the Government argues, demonstrates that the organization had not turned its back on Petitioner at all, much less in the brutal way that it had expelled and tortured Ginco. However, even if Al-Adahi's expulsion was handled with uncommon

leniency because of b(1), b(6) status, this fact demonstrates at most that Al-Adahi was being protected by a concerned family member; it most certainly is not affirmative evidence that Al-Adahi embraced al-Qaida, accepted its philosophy, and endorsed its terrorist activities.

For these reasons, under the analysis in Gherebi, Petitioner cannot be deemed a member of the enemy's "armed forces." See Gherebi, 609 F. Supp. 2d at 68-69. Al-Adahi was expelled from Al Farouq after seven to ten days at the camp; as discussed below, the Government has not established that he did anything to renew connections with al-Qaida and/or the Taliban. He did not, by virtue of less than two weeks' attendance at a training camp from which he was expelled for breaking the rules, occupy "some sort of 'structured' role in the 'hierarchy' of the enemy force." Id.

Finally, Petitioner's demonstrated unwillingness to comply with orders from individuals at Al Farouq shows that he did not "'receive[] and execute[] orders' from the enemy's combat apparatus." Id. at 69. Al-Adahi attended the camp briefly, and was expelled for his refusal to take orders. Therefore, Petitioner's admission that he trained at Al Farouq is not sufficient to carry the Government's burden of showing that he was a part, or substantial supporter, of enemy forces. Cf. Al Ginco, 2009 WL 1748011, at *4 (relationship with al-Qaida may be "vitiated" by intervening events); id. at *5 ("To say the least, five days at a guesthouse . . . combined with eighteen days at a training camp does not add up to a longstanding bond of brotherhood.") .

b. Instructor at Al Farouq

The Government relies on a statement from one other detainee, as well as several pieces of circumstantial evidence, to argue that Al-Adahi not only attended Al Farouq, but also served as a trainer at the camp.

As its most direct piece of evidence supporting this claim, the Government points to a statement made by b(1), b(2), b(6) b(1), b(2) b(6) that he could identify ISN 33 by his kunya, [redacted] because b(1) [15] JE 29 at 1; JE 38 at 5. A significant problem with this testimony is that there is no other evidence placing Al-Adahi in Afghanistan prior to July of 2001. b(1), b(6)

b(1), b(6)
Id. Additionally, when he was later shown [redacted] ISN 33, 6 [redacted] claimed the man's name was [redacted] whose kunya is 6 [redacted] JE 101 at 2; cf. JE 104 at 2 (reporting that detainee uninvolved in this case had a Saudi uncle named 6 [redacted] who clearly was not same man as Al-Adahi). The Government claims this is simply a mis-identification. When coupled with the early-2000 date given by 6 [redacted] in an earlier

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[15] In August of 2003, 6 [redacted] provided a physical description of [redacted] who he claimed was a "chief trainer." JE 102 at 1.
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statement, the mis-identification casts serious doubt on the accuracy of his statements.

Petitioner insists that his only travel out of [redacted] occurred in July of 2001, when he escorted his sister to Kandahar. In support of this position, he presents documents from [redacted] JE 71, where he had worked for about 20 years before departing for Afghanistan, JE 13 at 1. The documents purport to show that Al-Adahi requested six months of non-paid leave on July 9, 2001. Id. at Attachment B.[16] They also purport to show that he was on the company's payroll in June of 2000 and April of 2001, id. at Attachments C, E; that he was eligible for an annual bonus for 2000, id. at Attachment D; and that he appeared on a list of employees whose staff allowances were not subject to retirement deduction in 2000, id. at Attachment F. Each document was signed, and many were stamped. Id.

Petitioner has represented that they are authentic documents, based chiefly on the declaration of [redacted] an employee at the National Organization for Defending Rights and Freedoms ("HOOD"). Pet.'s Ex. ("PE") [redacted] reports that he delivered counsel's request for these documents to the [redacted] via a relative of Al-Adahi's, and then emailed counsel the documents contained in Joint Exhibit 71. PE 2 at 2.

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[16] In what appears to be the only instance in the record where Al-Adahi veered from his story that he intended to spend an extended period of time in Afghanistan, he told interrogators in 2006 that "he was only to stay one day [in Afghanistan] and return to [redacted]" JE 25 at 2.

The Government objects to the reliability of the documents. It points out several mis-translations of key dates, including one where the company cut ties with Al-Adahi because of his inclusion on a February 2001 list of Guantanamo Bay detainees. JE 71 at Attachment A. Because the facility was not detaining suspects in the War on Terror at that point, the Government argues that the accuracy of the documents cannot be relied upon.

The [redacted] evidence is problematic for a number of reasons. First the Petitioner, has not asked for and does not start with a presumption of authenticity for the documents he produces. Second, there are gaps in the chain of custody of these documents. Third, it is unclear who entered the information contained in them, and whether such information was entered contemporaneously. Fourth, they contain factual and/or translation errors--such as the statement about the February 2001 list of Guantanamo Bay detainees--that raise serious doubts about their accuracy. In short, they do not prove that Petitioner was not in Afghanistan in early 2000 when b(1), b(6) says he was.

Despite this conclusion, it is still difficult to credit b(1), b(6) assertion that Al-Adahi was at Al Farouq in January or February 2000. Al-Adahi's consistent statements to interrogators, as well as his in-person testimony during this proceeding, all place him in Afghanistan no earlier than July of 2001. The Government has presented no evidence other than b(1), b(6) comment to contradict this timeline. Instead, it suggests that Al-Adahi is unreliable and manipulative at times, and therefore his statements

cannot be accepted as to the commencement of his time in Afghanistan.

This argument is difficult to credit in full The Government relies heavily on Al-Adahi's inculpatory admissions. It cannot have it both ways, i.e., when he says something that supports the Government's position he should be believed, but when he says something that contradicts the Government's position he is a liar. Finally, it is an assertion that is not backed up by facts: there is no evidence in the record that Al-Adahi was involved in activity related to al-Qaida and/or the Taliban before July of 2001. Without more, the Court cannot rely on b(1), b(6) statement.[17]

Further undermining the reliability of b(1), b(6) comments, the record contains evidence that b(1), b(6) suffered from "serious psychological issues." JE 29 at 1; Pet.'s Mot. at 17-18. The Government itself has expressed skepticism about the value of b(1), b(6) statements, and noted his attempts to manipulate other detainees into undermining intelligence efforts. PE 4. For all these reasons, the Court concludes that his identification of Al-Adahi as a trainer is not reliable independent evidence that Petitioner occupied that role.

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[17] It bears mentioning that b(1), b retracted his allegations against Al-Adahi in two separate documents. JE 81; JE 82. The recantations are somewhat generic, and inconsistent with each other. Their main impact is not to prove one version of b(1), b(6) account right or wrong, but to suggest that his statements about Al-Adahi are scattered, difficult to interpret, and not probative of anything.

The Government maintains that b(1), b(6) testimony is accurate when it is considered in light of Al-Adahi's intimate knowledge of Al Farouq's operations and recruits. In several intelligence reports b(1)
JE 52 at 3; JE 26 at 5 b(1) JE
52 at 2, b(1) id. at 1-2, b(1)
b(1) id. at 3.
This knowledge, the Government argues, could only be possessed by a person who was entrusted with a supervisory role in the camp.

The Government is not correct. Al-Adahi's detailed knowledge of camp routine could well have been developed during his seven-to-ten-day stay there. Similarly, the information that he provided about other recruits could have come from conversations with them about their prior travels and future plans. For instance, the fact that he was familiar with the routines followed by the Africans may prove only that Al-Adahi was observant; moreover, all of Al-Adahi's descriptions were of their training habits only, which he could have observed from afar. Id. Though the Africans did not speak Arabic, Petitioner had access to them at "the mosque, chow hall area and sometimes at fitness training," where non-verbal communication could have taken place. Id. The Government's corroborative evidence on this point is highly speculative, and does not confirm b(1), b(6) dubious allegation.

For all these reasons, the Court finds that the Government has not established that Al-Adahi was a trainer at Al Farouq.

4. Bodyguard for Usama Bin Laden

To establish its allegation that Al-Adahi was a bodyguard for Bin Laden, the Government makes an argument similar to its contention that Petitioner was an instructor at Al Farouq. It offers what it calls "direct" evidence from another detainee that Al-Adahi did security work for Bin Laden, and attempts to substantiate that evidence by pointing to Al-Adahi's familiarity with other Bin Laden bodyguards. The Government does not meet its burden on this point.

The principal evidence to support this allegation comes in the form of b(1), b(2), b(6)
b(1), b(2), b(6) b(1), b(2), b(6)
b(1), b(2), b(6)
b(1), b(2), b(6) JE 35 at 1-2. b(1), b(6)
b(1), b(6)
b(1), b(6) JE 35 at 1-2. b(1)
b(1)
b(1) Id. at 2.
b(1)
b(1) Id. at 1.

In an earlier report, b(1), b(6)
b(1), b(6)
b(1), b(6) JE 30 at 1. b(1), b(6)
b(1), b(6)
b(1), b(6) Id. at 1. b(1), b(6)
b(1), b(6)
b(1), b(6) Id. There is absolutely no other mention in the record of Petitioner's involvement with a Taliban prison, except for his denial of this

accusation during his testimony. Tr. at 31-32 (June 23, 2009).

Although the intelligence reports do not mention whether b(1), b(2), b(6) accounts are lengthy and detailed, which are two important indicia of reliability. Nonetheless, the witness himself suffers from serious credibility problems that undermine the reliability of his statements. JE 57 at 1-4 (outlining psychological problems and self-harm incidents); JE 75 (independent assessment of medical records); JE 76 at 3, 5 b(1), b(6) report of torture by Taliban, and emotional problems brought on by father); JE 91 (containing August 2005 admission by b(1), b(6) that he lied in past, and promise that he will not lie again). What is equally worrisome is that before b(1), b(6) made the above statements, interrogators had expressed concern that he was being manipulated by another detainee. JE 87 at 2; before being placed next to that detainee, b(1), b(6) had never made any of the claims that he made to interrogators, including the accusation against Al-Adahi. Id.

Further, the Government's corroborative evidence does little to compensate for the deficiencies specified above. There is evidence in the record that b(1), b(6) b(1), b(6)

b(1), b(6) See JE 15 at 1; JE 35 at 1. Similarly, there is evidence that Al-Adahi had a Casio watch when captured, JE 45 at 3, which the Government argues is a telling piece of al-Qaida paraphernalia. Gov Mot. at 16-17.

That Government asks the Court to infer that because b(1)

b(1) at some point during his stay in Afghanistan, b(1), b(6) is credible. That confirmed detail, in turn, would strengthen the reliability of b(1), b(6) . The inference simply does not make sense--or in the words of a noted legal philosopher, "that dog won't hunt."[18]

A seemingly stronger argument is made by reference to Al-Adahi's description of other Bin Laden bodyguards. In a 2008 interrogation, Petitioner provided biographical sketches of a number of men who he claimed were Bin Laden bodyguards. JE 51. In all, he provided similar information for 12 bodyguards. Id. at 4-8. In the Government's view, this familiarity with Bin Laden's protectors suggests that Al-Adahi knew these men well, and worked closely with them. It argues that such a conclusion, if true, would corroborate b(1), b(6) account.

The Government's position has some appeal. Al-Adahi does provide factual details about the other bodyguards that, on the surface, seem to indicate more than a passing familiarity with the men. For instance, one man, [redacted] had "fat thighs but was quick." Id. at 6. Another knew how to read, write, and speak English. Id. at 5. These are the sort of personal details that one does not usually learn about during a casual meeting; rather, they suggest a closer relationship.

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[18] Needless to say, b(1) are hardly unique items, even in Afghanistan.

The Court ultimately cannot credit this evidence as sufficient corroborative information to help carry the Government's burden. Upon careful analysis, the biographical sketches of the alleged bodyguards are not as significant as the Government portrays them to be. First, it is not clear from the intelligence report which parts of the sketches were provided by Petitioner and which were conclusions inserted by intelligence officials. Second, in many cases, Al-Adahi (if he was the source of all of the information) knew no more than a man's hometown, general familial relationships, and physical attributes. Given the length of his stay with b(1), b(6) and the fact that he met some of the men on more than one occasion, he could have assembled this information, along with the more idiosyncratic descriptions above, based on informal interactions with them, especially since so many of them were from Taiz. It need not be the case that the only reason Al-Adahi could have come across this evidence was because he shared bodyguard duties with them.

Because b(1), b(6) account of Al-Adahi's activities is undermined severely by the witness's psychological problems and checkered history of reliability, the account cannot stand on its own to carry the Government's burden. The Government's use of speculative evidence about b(1) does little to shore up b(1), b(6) statements. Finally, Petitioner's familiarity with other bodyguards does not, without more, compel the conclusion that he knew the men as a result of his service as a Bin Laden bodyguard.

5. Post-Training Activities

Following his brief period of training, the Government contends that Petitioner engaged in activities that demonstrate a continued commitment to al-Qaida. The Government marshals pieces of circumstantial evidence to support its allegations that after training, Al-Adahi fought for al-Qaida, stayed in the company of al-Qaida fighters, and then was arrested on a bus while fleeing from Afghanistan to Pakistan with al-Qaida soldiers.

First, the Government alleges that Al-Adahi participated in battle as an al-Qaida fighter. The Government has no statements or confessions to support its allegation that Al-Adahi fought; rather, it builds its case by pointing to inconsistencies in Al-Adahi's versions of the events that led up to his capture, as well as inferential evidence that suggests terrorist conduct. In the absence of any affirmative evidence of this allegation, the Government argues that Al-Adahi's travel pattern during September of 2001 closely tracked the location of several battles involving al-Qaida forces. See Gov. Opp'n at 3-4. Cf. JE 4 (detailing location of battles); PE 5.

The Government argues that Al-Adahi's "cover story"--that he was fleeing Afghanistan as quickly as possible after bombing of the region--rings hollow. It points to his general lack of credibility in other areas, including his explanation of an injury that he suffered while fleeing, to cast doubt on his version of events. Also, the Government notes Bin Laden's edict that men must stay in Afghanistan and wage jihad as evidence of Petitioner's reason for staying in the country and fighting. JE 55 at 4.

The Government pointed to several accounts Petitioner offered about how he suffered an injury to his arm and leg before being captured. However, each account included the same central detail that he sustained the injury after falling from a motorcycle in Kandahar. See JE 13 at 2; JE 33 at 6; JE 15 at 2; JE 14 at 1. One version of the story blames the accident on driving too fast and hitting a cart, JE 15 at 2; a second version involves b(1)
b(1) , JE 33 at 6; in a third telling, Al-Adahi fell off of the vehicle while attempting to flee Kandahar, JE 13 at 2. Yet another version has Petitioner slipping off the motorcycle. JE 14 at 1. According to the Government's reasoning, these slight variations, together with his "diplomatic" expulsion from Al Farouq and arrest on a bus with Taliban fighters, indicates that his motorcycle "cover story" conceals the truth that he was injured in battle. See Gov. Mot. at 20.

It is correct that some minor details in the motorcycle story are not described identically in each interrogation, and this may cast doubt on precisely how Al-Adahi was injured. Nonetheless, the Government provides only speculation to resolve that doubt, contending that his travel pattern and association with Taliban fighters mean that Petitioner took up arms. Such a serious allegation cannot rest on mere conjecture, with no hard evidence to support it.[19]

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[19] It must be emphasized that the Government had no evidence from anyone who claimed to have seen or claimed to have even heard that Al-Adahi was involved in combat activities.

Unable to prove the more serious allegation of actual participation in combat, the Government cannot rely solely on what is only associational evidence about Al-Adahi's stay at stay at b(1), b(6) and arrest in the company of individuals rumored to be part of the Taliban. Such evidence is not sufficient to carry the Government's burden.

First, the Government appears to pin its associational evidence that Petitioner was captured while traveling in the company of Taliban fighters on a statement made by Al-Adahi that "[a]fter his capture, [he] heard that there were members of the Taliban on the bus." JE 14 at 2 (emphasis added).[20] This second-level hearsay suggests that Al-Adahi did not know the passengers' identity before boarding, and that the information was passed on to him by an unknown source. Second, it is not clear what type of bus--public or private--Petitioner boarded in fleeing Afghanistan; moreover, there is no evidence that he sought to join or was already part of a band of fighters fleeing the region. See JE 14 at 2 (describing bus trip and arrest on bus). Further, when he was arrested on the bus by Pakistani authorities,[21] b(1)

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[20] During an earlier bus ride, from Kandahar to Khost, Al-Adahi reported that he rode with "wounded Taliban soldiers." JE 14 at 3. He departed that bus at Khost and boarded a bus for Miram Shah. He was captured during or after this bus ride.

[21] In another recounting of his story, Al-Adahi boarded the bus from Khost, and headed toward Miram Shah with Arabs and Pakistanis (the same groups he said were on the bus in JE 98). JE 14 at 3. However, the arrest took place in a "large, modern city, with a large market area;" Petitioner had walked there after leaving the bus several hours earlier. Id. He stated that he had his passport with him.

b(1) and was unarmed. JE 98 at 1; JE 33 at 7. He appeared to be attempting to escape the chaos of that time by any means that he could.

The Government's allegations regarding Al-Adahi's post-training activities are significant because they provide context to Petitioner's admission about training. In short, his conduct after training at Al Farouq does not demonstrate that Al-Adahi took any affirmative steps to align himself with al-Qaida. The record shows that he returned to b(1), b(6) house for a few weeks, attempted to flee Kandahar, injured himself and received treatment, and then again made efforts to escape Afghanistan. The Government offered no substantive evidence that he continued on a course of substantial support for al-Qaida. Instead, it appears that once his break with the group was initiated by al-Qaida, Al-Adahi accepted his expulsion and never attempted thereafter to become a member or supporter of al-Qaida, or to further its activities in any way.

IV. CONCLUSION

When all is said and done, this is the evidence we have in this case. Al-Adahi probably had several relatives who served as bodyguards for Usama Bin Laden and were deeply involved with and supportive of al-Qaida and its activities. One of those relatives became his brother-in-law by virtue of marriage to his

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This inconsistency simply cannot be resolved. The underlying fact of his arrest by the Pakistani military, however, is not in dispute. Cf. JE 14 at 3; JE 13 at 2.

sister, b(1), b(6) Al-Adahi accompanied his sister to Afghanistan so that she could be with her husband and b(1), b(6) . The wedding celebration was held in Bin Laden's compound and many of his associates attended. At that celebration, Petitioner was introduced to Bin Laden, with whom he had a very brief conversation. Several days later, the Petitioner had a five-to-ten-minute conversation with Bin Laden.

Thereafter, Petitioner stayed at an al-Qaida guesthouse for one night and attended the Al Farouq training camp for seven to ten days. He was expelled from Al Farouq for failure to obey the rules. This training represents the strongest basis that the Government has for detaining Al-Adahi. However, under the AUMF and the standards described in Gherebi, Petitioner's brief attendance at Al Farouq and eventual expulsion simply do not bring him within the ambit of the Executive's power to detain.

After his expulsion, Al-Adahi returned to the home of his sister and brother-in-law for several weeks and then traveled to other places in Afghanistan because he had no other obligations. Like many thousands of people, he sought to flee Afghanistan when it was bombed shortly after September 11, 2001.

There is no reliable evidence in the record that Petitioner was a trainer at Al Farouq, that he ever fought for al-Qaida and/or the Taliban, or that he affirmatively provided any actual support to al-Qaida and/or the Taliban. There is no reliable evidence in the record that Petitioner was a member of al-Qaida and/or the Taliban. While it is tempting to be swayed by the fact that Petitioner readily acknowledged

having met Bin Laden on two occasions and admitted that perhaps his relatives were bodyguards and enthusiastic followers of Bin Laden, such evidence--sensational and compelling as it may appear--does not constitute actual, reliable evidence that would justify the Government's detention of this man. For these reasons, and the reasons set forth above, the Court **grants** the petition for a writ of habeas corpus.

Mindful of the limitations on the scope of the remedy in this situation, see Kiyemba v. Obama, 555 F.3d 1022, 1024 (D.C. Cir. 2009), the Court further orders the Government to take all necessary and appropriate diplomatic steps to facilitate Petitioner's release forthwith. Further, the Government is directed to comply with any reporting requirements mandated by the Supplemental Appropriations Act, Pub. L. No. 111-32, 123 Stat. 1859 (2009), if applicable, to facilitate Petitioner's release, and to report back to the Court no later than September 18, 2009, as to the status of that release and what steps have been taken to secure that release.

/s/

August __, 2009

2009 Gladys Kessler
United States District Judge

Copies to: Attorneys of Record via ECF

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 05-280 (GK)

MOHAMMED AL-ADAHI, et al.,	)
	)
Petitioners,	)
	)
v.	)
	)
BARACK H. OBAMA, et al.,	)
	)
Respondents.	)
	)

ORDER

For the reasons set forth in this Court's Classified Memorandum Opinion of August 17, 2009,[1] it is hereby

ORDERED, that Petitioner Mohammed Al-Adahi's petition for a writ of habeas corpus is **granted**; and it is further

ORDERED, that the Government is directed to take all necessary and appropriate diplomatic steps to facilitate Petitioner's release forthwith. Further, the Government is directed to comply with any reporting requirements mandated by the Supplemental Appropriations Act, Pub. L. No. 111-32, 123 Stat. 1859

[1] The Classified Opinion is currently undergoing classification review. As soon as it is completed, the Unclassified Opinion will be made public.

(2009), if applicable, to facilitate Petitioner's release, and to report back to the Court no later than **September 18, 2009**, as to the status of that release and what steps have been taken to secure that release.

/s/
2009 Gladys Kessler
United States District Judge

August __, 2009

Copies to: Attorneys of Record via ECF

APPENDIX C

UNCLASSIFIED/FOR PUBLIC RELEASE

TRANSCRIPT OF MERITS HEARING
(June 23, 2009)

* * *

[p.51]

seat, and Mr. Chandler will now begin the questioning -- or will it be Ms. Wilhelm?

MR. CHANDLER: Ms. Wilhelm.

THE COURT: Ms. Wilhelm, please, and for the record, why don't you just quickly identify yourself?

MS. WILHELM: Yes, Your Honor. Kristin Wilhelm for petitioner Mohamed Al-Adahi.

MOHAMED AL-ADAHI, THE PETITIONER, SWORN AND TESTIFIED THROUGH HIS INTERPRETER

DIRECT EXAMINATION

BY MS. WILHELM:

Q. Mr. Al-Adahi, would you please state your full name for the record?

A. My name is Mohamed Ahmed Saed Al-Adahi.

Q. Mr. Al-Adahi, are you a citizen of any country?

A. I am a citizen of Yemen, city of Ta'iz.

Q. How long have you lived in Yemen?

A. All my life in Yemen. I never left Yemen. I left Yemen in 2001.

Q. Mr. Al-Adahi, are you married?

A. Yes.

Q. What is your wife's name?

A. 6 [redacted] the name of my wife.

Q. Mr. Al-Adahi, do you have any children?

A. Yes.

[p.52]

Q. What are the names of your children?

A. I have two kids. A boy and a girl. My daughter is 6 [redacted] and my son is name is 6 [redacted]

Q. How old is your daughter?

A. My daughter is now around 14 years old.

Q. How old is your son?

A. My son is about 12 years old.

Q. Mr. Al-Adahi, did you travel to Afghanistan in July, 2001?

A. Yes. My travel because of necessity. I was accompanying my sister to take her to her husband.

Q. What is your sister's name?

A. Amani.

Q. What is your sister's husband's name?

A. Riyadh Abd Al-Aziz Almujahid.

Q. And if I refer to your brother-in-law as Riyadh, will you understand to whom I am referring?

A. Yes.

Q. Did you know Riyadh before he married your sister?

A. Just very lightly and since a long time. There is no friendship or relative relation.

Q. Was your sister's marriage to Riyadh an arranged marriage?

A. Yes. It was a socially family general marriage.

Q. And Mr. Al-Adahi, what was your role in the marriage

[p.53]

negotiations?

A. With regard to women in the beginning, Riyadh's family, they came to my family. Riyadh's family asked my family for the hands of my sister. My sister agreed. My mother agreed. They asked my approval, and being the eldest brother, my sister give me the power of attorney to finish the marriage contract.

Q. Before taking your sister to Afghanistan, did you obtain a passport?

A. Yes.

Q. And would you tell the court how you obtained the passport?

A. My brother-in-law, Riyadh, wants me to contact his wife. I had to go to the passport agency, to the official passport agency in Ta'iz. I issued two passports. One for me, and one for my sister with the help of an employee in this office in July, 2001.

Q. Was that the first time you obtained a passport?

A. Yes. I never traveled before to any place.

Q. And did you need to obtain a visa to travel to Pakistan?

A. I did not travel before. I did not know that visa business. But my brother-in-law, Riyadh, he contacted me. He told me he had a friend in Sana, and he is going to take care of all of the visa processing and the tickets.

[p.54]

Q. How did you pick up the visa and the tickets?

A. My brother-in-law, Riyadh, he contacted me, and he told me, now you can go, you and your sister to Sala.

(Whereupon, the connection to Guantanamo was broken.)

MR. CHANDLER: Your Honor, while we are frozen, is that monitor close enough to you so that you can see him?

THE COURT: Well, I wouldn't mind it a bit closer, I admit that. But I gather from Mr. Cramer that this one has to be for all of the attorneys to use.

MR. CHANDLER: I think we can do without that. We can turn that towards you, and I would be just fine with that.

THE COURT: Thank you. Well, now it went off completely, everybody.

MR. CHANDLER: I thought Ms. Wilhelm couldn't think of her next question.

THE COURT: She wouldn't have any trouble thinking of her next question.

MR. BENNETT: Your Honor, this might be a good time to make a point. I am sitting next to the translator who you undoubtedly remember from this morning. She is following along making sure that everything is being translated accurately.

The one point that she has raised is when Mr. Al-Adahi is talking about --

* * *

[p.84]

Al-Adahi to finish his answer to the question, how did he pick up the visa and the tickets?

THE INTERPRETER: Do you want me to repeat to him what you said, Your Honor?

THE COURT: I think it might help him. Should I repeat it to you?

THE INTERPRETER: Okay.

THE COURT: My brother and all, he contacted me and told me, now you can go, you and your sister, and he could not get beyond that.

THE DEFENDANT TESTIFIED THROUGH HIS INTERPRETER: My brother-in-law told me, take your sister and go to Sana. You will meet a man in front of a bank, El-Arabi, the Arab Bank. He made all the process to get the visa and the tickets to travel.

MOHAMMED AL-ADAHI, THE PETITIONER, PREVIOUSLYL SWORN TESTIFIED THROUGH HIS INTERPRETER

DIRECT EXAMINATION CONTINUED

BY MS. WILHELM:

Q. What was the name of this individual?

A. He told me that his name was Ali Yayha.

Q. Had you ever met him before?

A. No.

Q. Do you know how he was able to recognize you when you met with him?

[p.85]

A. Yes.

A. My brother-in-law told me -- I told -- I asked my brother-in-law how would this guy recognize me? My brother-in-law said, you go there and you wear a red jacket, and this man will come to you, and he will greet you by your name, and he will recognize you.

Q. How would he be able to recognize you if you had never met him before?

A. Because my brother-in-law contacted him, and he told them that my brother-in-law will meet you at the Arab Bank, and you will know him by the picture of the passport.

Q. Was the passport -- was your passport issued to you in your official name?

A. Both -- the two passports, one under my name and the other one under my sister's name. You can verify that from the passport agency in Ta'iz city in July, 2001.

Q. Did you ever see Mr. Ali Yayha again?

A. Ali Yayha told me, here is the two passports, and here is the visa, and he gave me some money. He did not give me the visa. The visa is in the passport, and he give me some money, and he told me, here is my number. If you have any problem, call me.

What happened that I lost my sister's ticket, so I called them in order to get us another ticket.

Q. How long were you in Sana, Yemen?

[p.86]

THE COURT: Excuse me, but before you translate that question I want to clarify something with the interpreter.

Just a minute ago you indicated the date of July, 2001. Was the petitioner giving you the word July, 2001? Or was he referring to the Arabic calendar?

THE INTERPRETER: He referred to July, 2001. I did not transfer from Arabic calendar to the American calendar.

Can I verify with him, Your Honor?

THE COURT: Let me phrase it this way.

Using the American calendar, is the answer to that question July, 2001, or is it a different month using the American calendar?

THE INTERPRETER: I will check with him, Your Honor.

THE DEFENDANT TESTIFIED THROUGH HIS INTERPRETER: Your Honor, I said you can verify from Ta'iz, Sana, from the passport agency the date of July, 2001, because I issued the passport in July, 2001.

THE COURT: Ms. Wilhelm, repeat your last question, please.

MS. WILHELM: Thank you, Your Honor.

BY MS. WILHELM:

Q. How long did you stay in Sana, Yemen?

[p.87]

A. About one week. I traveled on Sunday, and the traveling -- I left on Monday when we lost the ticket, and we were supposed to wait for the following trip a week later.

Q. Where did you go from Sana, Yemen?

A. Me and my sister left Tabai, and then from Tabai we left to Karachi.

Q. How long did you stay in Karachi, Pakistan?

A. I arrived in the beginning of the night. I spent the night in a hotel, and in the morning I left.

Q. Where did you go from Karachi, Pakistan?

A. We took the plane to Kwatah, and from Kwatah to Kandahar.

Q. Where did you stay in Kandahar?

A. My brother-in-law arranged it -- arranged a place for us, for guests in the house of my sister for preparation for the party. Then later on we moved to the new house of my brother-in-law's house.

Q. Mr. Al-Adahi, did you attend a wedding celebration for your sister?

A. Yes.

Q. And did Osama bin Laden also attend that wedding ceremony?

A. A lot of people attended the wedding party. Among them was Osama bin Laden.

[p.88]

Q. Did you meet Mr. bin Laden at the wedding party?

A. My brother-in-law introduced me to all of the guests who came to congratulate for the wedding.

Q. Did you know Mr. bin Laden before you were introduced to him at your sister's wedding?

A. **(The answer was unintelligible due to technical difficulties in the transmission.)**

Q. Did you have any other interactions when you were in --

(The remainder of the question and the answer was unintelligible due to technical difficulties in the transmission.)

Q. Any further interactions with Osama bin Laden while you were in Afghanistan?

THE COURT: I think we have to stop. Don't cut them off, Mr. Cramer. They can keep on talking. I think we have to stop it. Something is very wrong, and we are missing parts of it.

For our record, first the screen started looking very strange to say the least. I felt like I was watching a horror movie. And then we began losing the audio, which was, of course, very important. So I instructed Mr. Cramer, our IT guru, to turn it off.

Of course I don't know what was happening. Maybe if you just place the call again. We will try that. It is

* * *

[p.90]

THE COURT: Let's start with that question. Would our translator please give that question? Did you know bin Laden before you were introduced to him?

THE DEFENDANT TESTIFIED THROUGH HIS INTERPRETER: I never knew him before, but I always see his picture on television.

THE COURT: Ms. Wilhelm, you may proceed now.

MS. WILHELM: Thank you, Your Honor.

BY MS. WILHELM:

Q. Other than meeting Mr. bin Laden at your sister's wedding, did you have any other interactions with Osama bin Laden while you were in Afghanistan?

A. I never dealt with Osama bin Laden, but one day he called us. I have nothing -- no relation between me and him. But some Arabs that were, there they told us that Osama bin Laden is in Kandahar.

Any stranger comes to Kandahar, Osama bin Laden -- I am sorry, he wants to meet him, and he wants to ask him questions. He met me to know me better.

Q. How long was your meeting with Osama bin Laden?

A. About five minutes or ten minutes.

Q. What did you discuss during this conversation?

A. He told me how Yemen, and asked me about Yemen and how the Muslims over there. He asked me about some chiefs in Yemen. He wanted to make sure that I am a Yemeni.

[p.91]

Q. Mr. Al-Adahi, How soon after you arrived in Afghanistan was your sister's wedding celebration?

A. About five days, a week, ten days. What happened to me here during the past 7 ½ years I cannot be specific in the days.

Q. How soon after the wedding ceremony did you have this meeting with Mr. bin Laden?

A. About three days.

Q. After that meeting with bin Laden did you ever see him again?

A. Never.

Q. Mr. Al-Adahi, have you ever served as a bodyguard for bin Laden?

A. Never.

Q. Do you know if your brother-in-law, Riyadh, was a bodyguard for bin Laden?

A. Riyadh did not tell us that he is a bodyguard to bin Laden. But I doubt that he is a bodyguard. I know that he is from mujahidin.

Q. What is mujahidin?

A. In Islam jihad is a legitimate issue. The whole world know about the fight of mujahidin against the Russian in Afghanistan. Anybody who fights people in a country that they want to invade other countries, that is jihad, according to religion not to desire.

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America supported the mujahidin that fighted against the Russians. The scholar in Saudi Arabia and Yemen, they made one for jihad.

Q. Now prior to leaving Yemen had you ever heard of Al Qaeda?

A. Never.

Q. Prior to leaving Yemen did you intend to go to Afghanistan to fight in the jihad?

A. My goal of going to Afghanistan is to take my sister to her husband, and that is it.

Q. Mr. Al-Adahi, are you a mujahidin?

A. In Islam jihad is legitimate, but it has control. Jihad in Islam is part of Islam. Yemen started jihad when the people want to separate from the law. They raise the flag of jihad when the Northern wants unity in 1994. The world knew about that.

Q. Did you fight in the Civil War in 1994?

A. I did not fight, but I was preparing myself. I never went to jihad in any country in the war.

Q. Have you ever fought against any country in the world?

A. I did not leave Yemen. How would I fight?

Q. Let's go back to your time in Kandahar.

How long did you stay in Kandahar after you brought your sister to her husband?

[p.93]

A. For a long time. I cannot specify whether it is a month, a month and a half, two months. The hell that I seen from the American when I was arrested made me forget a lot of things.

Q. All right. While in Kandahar did you ever go to a guesthouse?

A. Yes.

Q. What was the name of that guesthouse?

A. The guesthouses are the gathering of the Arab and the Muslim. I met some Arab, and they suggested that I go to this guesthouse. You will meet people instead of being alone.

I went to a place by the name of Nibras, and another place by the name of Haji Habashi. It was a gathering for the Muslims -- for the Muslim community, and Arab people talking the Arabic language.

Q. How long did you stay at Al Nibras?

A. I went to Nibras and I stayed there only for one day.

Q. Did you give up you passport while you were at Al Nibras?

A. I never give up my passport until the Pakistani took it from us -- when the Pakistani arrested me.

Q. Where did you go from al Nibras?

A. In Nibras some Arab spoke to me. They told me if you go to a camp by the name of Al Farouq camp -- I did not

[p.94]

know what was Al Farouq camp. They told me there you will have Islamic education. You can train using weapons. The following day they took us to Al Farouq camp.

Q. Why did you go to Al Farouq?

A. They told you can learn Islamic studies, and you can learn using weapons.

Q. How long were you at Al Farouq?

A. I am in Al Farouq for one week. As they say, I did not obey the rules. I used to oppose things with regard to the camp rules. They kicked us out from the camp.

Q. Did they kicked other people out, or did they just kick you out?

A. They kicked me out.

Q. Where did you go from Al Farouq?

A. To the house of my brother-in-law.

Q. Other than the one night that you spent in Al Nibras, did you ever go back to Al Nibras?

A. I don't remember.

Q. Did you ever go to Al Nibras ahead of Osama bin Laden to secure the guesthouse for a speech?

A. I did not go Nibras to make sure -- to secure -- to make sure of the security. Neither. I won't belong to the security of Osama bin Laden.

Q. While you were at Al Farouq, did Osama bin Laden come to the camp?

[p.95]

A. I heard that he went.

Q. Did you see Osama bin Laden at the camp?

A. No.

Q. Did you hear the term, Al Qaeda, while you were in Afghanistan?

A. I don't remember. The mosque thing for the people there is al mujahidin.

Q. When you left Al Farouq, where did you go?

A. I went to my sister's house, to my brother-in-law's house.

Q. At some point did you leave Kandahar?

A. A. Yes. I went to Kabul. I heard about -- what I heard about Kabul is the city was built by the Russians. I had a lot of time on my hands. I said, let me go and see the city.

Q. When you left Yemen to go to Afghanistan, how long did you plan to stay in Afghanistan?

A. I intended to stay in Afghanistan for only one month or for two months, and as a proof, my visa was for one month, but I took a leave of absence from my work for six months.

I did that just as a precaution. I could cut my vacation short, and I go back to my work. That is my intention, that I go back to my country and I go back to my work.

[p.96]

Q. Why did you plan to stay in Afghanistan for a month or two?

A. I made a condition to my brother-in-law that I'm going to bring my sister. If she settles down and if she is happy I will leave her here. If she is not settled and she is not happy, I will take her back to Yemen.

Q. Did you travel from Kabul to another location in Afghanistan?

A. Yes. When the war broke out and the bombing of the American, I wanted to go to a place that is safe. I found some families that are going to a safe place in Khost. I went with them.

As I mentioned before, I had no friends. I have no knowledge of the way of the country, and I had no intention to fight.

Q. When you were in Khost did you travel home?

A. What do you mean?

Q. Did you go back to Yemen?

A. What I was in Khost the war was on. They told me you cannot leave Khost and go back to Yemen. Wait until the things calm down, and you will be able later on to go to Yemen.

Q. I waited for awhile until I got worried. I said, let me risk and go to Kandahar, because I was worried about my sister, to take her from Kandahar and find a way to take her

[p.97]

to Yemen.

Q. When you arrived in Kandahar were you able to locate your sister?

A. When I went to Kandahar some other people told me, your brother-in-law was injured from the bombing, and people were injured, and they -- they had my sister and some family, they moved from Kandahar to Yemen, and they sent them to Yemen.

There is one thing I want to mention. When people start to get afraid that America will bomb

Afghanistan, and I have been trying to find a way to get out and go back to my country.

That was my intention. I did not fight the American. I did not fight the American alliance. I did not deal with Taliban or Al Qaeda. I am a working man in my country. I have never committed a crime. I am 47 years old. I have never committed a crime.

Q. From Kandahar where did you go?

A. In Kandahar the bombing was still there. I told -- I asked people, help me to get out of this country. They told me if you leave now there is the possibility that they will arrest you, and they will say that you are from the mujahidin.

If they see any Arab person they arrest them. The American was sending flyers. Every Arab person has a

[p.98]

certain price. Some people from Afghanistan -- Pakistan, they sell any Arab person whether he is teaching Koran, or relief, or he is an emigrant, or mujahidin.

Q. Mr. Al-Adahi, listen to my question.

Did you leave Kandahar to go somewhere else?

A. Yes.

Q. Where did you go?

A. I had the motorcycle. I borrowed it from one of many persons. I had some injury in my arm. I went to hospital for treatment. I found a group that they want to go to Pakistan. They are wounded.

We left from Kandahar to Khost, and from Khost later on we went to Pakistani border. We left through Miram Shah. We were near Bashira, the city in Pakistan. The soldiers came and they said, give us your ID cards. I gave them the passport and the tickets. I told them, I want to go to the Yemeni Embassy. He said, let's now take you to the hospital, then we turn you over to your country.

Q. Mr. Al-Adahi, when you were in the hospital in Pakistan, did a newspaper reporter come to the hospital to interview you?

A. When the Pakistani took us to the hospital, they took us to a military hospital. There was no sign of arrest. We are not tied up or handcuffed. They treated us to and they treated us nicely.

* * *

[p.100]

relation. We talk together. I was surprised when the lawyer told me that he spoke about you.

When the lawyer told me this detainee walked with me in 2 [redacted] When I asked him about the truth of what he said about me, he denied completely in front of all the prisoners.

He said that is all lies from the interrogators. I never seen you before, neither in Afghanistan or in any other place. I did not say that you trained us or that you tortured us. And I am going to give you my statement with my handwriting on that.

He give me a statement with his handwriting. I submitted to the lawyer, and thankfully -- thanks to the lawyer that he submitted to the Honorable Court.

Q. Did you serve as a trainer at Al Farouq?

A. I did not work in any place as a trainer. If they had kicked me out of Al Farouq, I did not stay the -- I did not finish one week staying there because I don't listen to instructions. How could I be a trainer? How can I be Osama bin Laden's bodyguard if they kick me out from Al Farouq camp?

This is a great mistake against the government. How could I be a trainer in Al Farouq camp if they kicked me out from the Al Farouq camp?

Q. Where were you in January and February of 2000?

* * *

[p.102]

we received about this man, he states that I tortured him in 2001, in the middle. And he accused us in 2005 when he said that he saw us in my block.

When I read the document that the government gave to us for one hour, I was surprised. How this man could recognize me four years after I tortured him as he claims. He lied and he slandered me.

When we were arrested and they turn us over to the Americans in Kandahar, they moved us to Cuba. Me and him were in the same block. He did not recognize me after six months. He recognized me after four years. I met him -- I saw him in many blocks.

Let me talk.

Q. You have a Casio watch. Mr. Al-Adahi, are you aware of the allegations related of your ownership of a Casio watch?

A. The latest document they did not mention the watch, but I remember it from before.

Q. When you attended your CSRT, did you see a watch that the personal representative provided you?

A. I only attended once, and they should me two watches. I told them none of them is mine. My watch was -- had hands, not electronic devices. How possibly they brought the watch?

They did not bring my passport, and also the personal

[p.103]

representative told the chief of the committee, it is a weak point to tie this man with a cheap watch with a big organization. All this exists in the docket. What is the story of that watch? I don't know the story of the watch.

Q. Mr. Al-Adahi, before you were taken into custody how was your health?

A. If you want to find about my health, you can check all the hospitals in Yemen. The Ministry of Health in Yemen. I worked in a petroleum company for 20 years. I have no sickness. I have no sickness.

And when we were arrested and brought us to Cuba, they, checked us completely. I had no sickness. The torture that I was subjected with the severe high air-conditioners and being naked without any stuff, the severe -- the violation -- the religious violation and the disrespect of the Koran, the forced shots that we took.

I have proof and I have medical records. And I have a very, very high blood pressure. Sometimes it reaches 220. The heart beats, it reaches almost a week ago about 120.

Throwing up every month. Lost memories. Forgetful. I became useless when I leave.

MR. BENNETT: Your Honor, I am sorry, could we do 90 seconds?

THE COURT: Let's take a break for just a moment. I want to talk with counsel anyway.

* * *

APPENDIX D

UNCLASSIFIED/FOR PUBLIC RELEASE

TRANSCRIPT OF MERITS HEARING
(June 24, 2009)

* * *

[p.12]

Q. To be clear though, whenever poor people in Arab countries get married, they don't all have their weddings at Osama bin Laden's house, is that correct?

A. Anyone -- a businessmen who has a large house, he also can have the celebration in a mosque or in a club.

Q. Okay, but your sister's wedding celebration to Riyadh was at Osama bin Laden's house, correct?

A. The celebration of the wedding which occurred in Osama bin Laden's house was only for men.

Q. So there were no women at all at the celebration, is that correct?

A. The celebration in Osama bin Laden's house was only for men. Islam prevent women and men to be together, so they have their own place for celebration, and there is no need for this line of questioning.

Q. Did the women have a separate celebration of the marriage of your sister, Amani, to Riyadh in Afghanistan?

A. What I said before. It is understood.

Q. Sir, please answer my question.

Was there a separate celebration of your sister, Amani's, marriage to Riyadh in Afghanistan that took place at the same time as the celebration of the men at Osama bin Laden's house?

A. Yes.

Q. And you mother did not attend that celebration, did

* * *

[p.21]

A. I don't know everything that Osama bin Laden does. I read here in some newspaper that we get once a month about jihad. I am not responsible for what they say or did. I am not responsible.

Q. Do you believe that the September 11th attacks were justified, sir?

A. I do not agree killing innocents. I don't support killing innocents. I did not know of this plan before. You ought to save your question when I told you I do not agree killing innocents.

Q. When you say that you don't agree with killing innocents, do you consider United States soldiers innocents?

A. The American soldier innocent? I did not attend that, and I don't know what the problem is. I have no intention of fighting the Americans. I never participated in any fight as I said before. You want me to issue a legitimate fatwa to all of the Muslims? I am not a scholar.

Q. Sir, if someone were to issue a fatwa, a scholar whom you respected, saying that it was okay to take up jihad against the United States, would you follow that fatwa?

MR. CHANDLER: Objection, hypothetical, vague. It does not provide enough circumstances to be a precise question or answer in any way.

THE COURT: The objection is overruled. The

* * *

APPENDIX E

Exhibit 111

FD-302 (Rev. 10-6-95)

FEDERAL BUREAU OF INVESTIGATION

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency

Date of transcription:

02/21/2003

DAVID MATTHEW HICKS, ISN US9AS-00002DP, was interviewed at Camp Delta, Guantanamo Bay, Cuba by Special Agents James Donovan and David R. Goodson of the Federal Bureau of Investigation. After being advised of the nature of the interview, HICKS provided the following information:

HICKS was shown a photo of Camp Delta detainee ISN US9SA-00051DP, MAJID AL-BARAYAN. HICKS could not remember the detainee's name, however he identified AL-BARAYAN as being a student at the basic training class at the Al Farouq training camp in Afghanistan. HICKS was not sure of the exact time frame that he saw AL-BARAYAN, since he has taken multiple training classes at Al Farouq. HICKS believes

he saw AL-BARAYAN in early 2001, around February or March.

There were approximately 60 students going through basic training when HICKS and AL-BARAYAN were together at the camp. There were approximately five to six classes going through the camp at one time. HICKS and AL-BARAYAN were in different classes. Of the 60 students, about a half dozen or so spoke English, including AL-BARAYAN. Because AL-BARAYAN spoke English, HICKS had the opportunity to speak with him. HICKS described AL-BARAYAN as being soft spoken and deliberate in his speech. He spoke rather slow. Based on the fact that HICKS and AL-BARAYAN were in separate classes, HICKS did not get the opportunity to interact with AL-BARAYAN on a regular basis.

All students that take the basic training class at Al Farouq get the same type of training, no matter what class they are in. The training consists of the following:

(1) Two weeks of weapons training - students shoot approximately 40 rounds.
(2) Two weeks of basic commando course
(3) Two weeks of topography.
(4) Two weeks of explosives.

Following the basic training, students go back to their safe house in Kandahar where they are given the following choices:

(1) They can sign up for advanced training such as guerrilla warfare, conventional warfare, and advanced explosives.

02/20/2003 Guantanamo Bay, Cuba

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SA James Donovan/jd
SA David R. Goodson

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, Page

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(2) They can go home.

(3) They can go to the front line and fight Jihad. The front lines for non-Afghans were in two areas, one was the airport in Bagram and the other was in the north close to Kunduz. These positions were defensive positions that saw little action. According to HICKS, the Taliban would attack and retreat often and because of the language barrier between Afghans and Arabs, only Afghans were allowed to be on the attack teams. Arabs and other foreigners were only allowed to fight at the defensive locations. Many Arabs did not have the patience to do this and were upset about the lack of action.

The Al Farouq training camp was funded by Al Qaeda and therefore was more advanced than other training camps in Afghanistan. The following countries and/or regions had training camps in Afghanistan;

Uzbekistan, Turkmenistan, Kashmir, Philippines, Indonesia, and Bangladesh.

HICKS saw Usama bin Laden approximately eight times. He traveled with multiple bodyguards with a convoy of two to three vehicles. The bodyguards blended in with the regular population and the only distinguishing feature was that they carried weapons.

If you were an Arab and you wanted to travel to Afghanistan you would get in touch with another Arab who would direct you to a training camp where you would take a basic operations class, similar to the one mentioned above. Following training you would get in touch with your Arab contact and he would lead you through Afghanistan. Based on AL-BARAYAN'S mannerism and personality, HICKS doesn't believe that AL-BARAYAN is the type that would go to the front lines and fight. According to HICKS, it is prestigious for a Muslim to be able to participate in military training which will give him the opportunity to fulfill his religious obligation of Jihad.

APPENDIX F

Exhibit 114

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 04-1254 (HHK)

MAHMOAD ABDAH, *et al.*,	)
	)
Petitioners,	)
	)
v.	)
	)
BARACK H. OBAMA, *et al.*,	)
	)
Respondents.	)
	)

DECLARATION OF
DR. BRIAN GLYN WILLIAMS

I, Dr. Brian Glyn Williams, hereby declare:

1. I am Dr. Brian Glyn Williams. The following information is true and correct to the best of my information, knowledge, and belief. I make this declaration in support of the habeas corpus petitions of the individual petitioners in Abdah v. Obama, Civil Action No. 04-1254. If called as a witness in this

matter, I could and would testify to the matters, facts, and opinions set forth herein.

2. I am a tenured Assistant Professor of Islamic History at the University of Massachusetts-Dartmouth where I teach courses on the history and culture of Afghanistan and Islamic Central Asia. I have spent over two decades studying and exploring those topics and have conducted field research throughout that part of the Islamic world, including three trips to Afghanistan since the terror attacks on the United States that took place on September 11, 2001 (the "9/11 Attacks"). A copy of my *curriculum vitae* is attached as Exhibit A, and I summarize my qualifications, background, and experience below.

3. I have been asked to provide my expert opinion regarding the migration of Arab men to and from Afghanistan, the differences between the Islamist Taliban government and the Neo-Taliban insurgency, and the modern history of armed conflict in Afghanistan.

Declarant's Background and Experience

4. I first became interested in Afghanistan while spending a semester abroad in Moscow, Soviet Union, in 1986-87, where I interviewed Soviet soldiers who had recently returned from fighting in Afghanistan. I earned a Master's Degree in Russian and East European History and a Master's

Degree in Central Eurasian Studies, both from Indiana University. I then earned a Ph.D. from the University of Wisconsin in Islamic Central Asian History with a Ph.D. minor in Russian History. Prior to accepting my current teaching position, I lectured at the University of London's School of Oriental and African Studies, and I began my teaching career at the University of Wisconsin, where I lectured on Islamic Central Asian and Medieval Middle Eastern History.

5. I have published two books/monographs. The first is entitled *The Crimean Tatars: The Diaspora Experience and the Forging of a Nation* (Brill Press 2001), and the second is entitled *Afghanistan 101: A Guide to the Afghan Theater of Operations* (U.S. Army Publications 2001). Also, in 1995, I received a grant from the Smith Richardson Foundation to write a book about the Afghan leader, General Rashid Dostum, and the proxy war on terror in Afghanistan. In addition, I have published over sixty articles, the majority of which discuss warlords, terrorism, ethnic violence, Al Qaeda, or conflict in Afghanistan and greater Central Eurasia, in various academic journals and policy magazines. I also have given numerous lectures on these topics at a variety of venues, both academic *(e.g.*, Harvard University, Columbia University, London School of Economics) and governmental (CIA Headquarters, Langley, VA; the Joint Information Operations

Warfare Command, Lackland AFB, TX.; the Naval War College, Newport, R.I.; the CIA'S Counter Terrorism Center, Tyson's Corner, VA; the Special Operations Command, Tampa, FL; and the Special Operations Wing; Hurlburt Field, FL).

6. I write for the Washington, DC-based Jamestown Foundation, which at one time was run by former National Security Advisor to President Carter, Zbigniew Brzezinski. I also write for the Combating Terrorism Center at the U.S. Military Academy at West Point, NY. My writings on the topics mentioned above have appeared in the *Washington Post, U.S.A. Today, Chicago Tribune, Boston Herald, Time Magazine, Times of London,* and *Christian Science Monitor,* and on National Public Radio. My publications, media articles, *curriculum vitae,* and photographs from my field work can all be seen at: www.brianglynwilliams .com.

7. I have served as an expert witness in more than two dozen immigration court asylum cases involving Afghanistan and the surrounding countries of Islamic Eurasia. I also served as an expert witness in the case of Salim Hamdan, personal driver and bodyguard of Osama Bin Laden.

8. In addition to my academic credentials, I have considerable field experience traveling in and studying various Islamic countries and regions, including Bosnia, Kosovo,

Israel's West Bank, Kazakhstan, and Kashmir. Most relevant to this matter, I traveled extensively across Afghanistan on three occasions after the U.S. military campaign in Afghanistan studying the history, politics, cultures, and conditions that led to the U.S.-Afghan conflict.

9. In 2003, I lived with the Uzbek warlord, General Rashid Dostum, whose forces fought against the Islamist Taliban government as part of the so-called Northern Alliance. I have either visited or lived in Kabul, Kandahar, Kunduz, Mazar i Sharif, the fortress prison at Qala i Jangi, and the Northern Alliance prison at Sheberghan. On this trip I came to know Dostum personally, interviewed scores of his prisoners of war, and got to know his field commanders.

10. I made a second trip to Afghanistan in 2005 and lived with both Dostum and the Tajik mujahideen of Ahmad Shah Massoud, the "Lion of Panjshir." Massoud was the leading figure in driving the Soviet Army out of Afghanistan and was killed on September 9, 2001, two days before the terror attacks against the United States. During that trip, I traced the battlefields of Operation Enduring Freedom across northern Afghanistan and, together with Uzbek field commanders who actually fought alongside U.S. special operations forces, visited the sites of several key battles.

11. My third and latest trip to Afghanistan was in 2007. On that trip,

travel from Herat, on the Iranian border, through the Hindu Kush Mountains down to Kabul, then through the Pashtun tribal areas on the Pakistani border,

12. This combination of academic research and field experience has given me a unique perspective on the modern history of Afghanistan, the (Islamist and Neo-) Taliban, Al Qaeda terrorism, northern Afghani warlords, and the modern history of armed conflict and insurgency in Afghanistan. It is this background that forms the basis for my opinions that follow.

Arab Migration to Afghanistan, Guesthouses, and Missionary Efforts

13. During the era of Islamist Taliban government, Afghanistan was open to migration by Yemeni and other Orthodox Muslims. Afghanis at the time were largely Sufi Muslims. Sufism was a pre-Islamic mystic religion that was rejected by Orthodox Islam. Arab Gulf Muslims, including Yemenis, were of the Orthodox variety and have been traveling to

Afghanistan since the 1980s to educate and convert the Afghani Sufis. The Islamist Taliban government welcomed Orthodox Muslims, because the Taliban was trying to "purify" Afghani Islam. Thus, Yemenis were welcomed into many missionary roles -- from teaching the Qur'an to working in medical clinics. Some Yemenis who immigrated to Afghanistan for such purposes brought their families with them.

14. Muslim missionaries routinely traveled through Pakistan on their way to do relief work in Afghanistan. Afghanistan did not have a functioning international airport or a sea border, and entry across the northern and western parts of the country was restricted by the presence and influence of competing ethnic groups (including groups controlled by Uzbek and Tajik warlords that would later comprise the Northern Alliance). Most of the Arab missionaries to Afghanistan entered through Pakistan, because it was both a friendly government[1] with ethnic ties to Afghanistan and a country with a functioning international airport with service to Yemen.

15. Arab missionaries, relief workers, and other immigrants to Afghanistan frequently stayed in guesthouses built to accommodate

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[1] Pakistan was one of three countries that officially recognized the Islamist Taliban as the legitimate government of Afghanistan, the other two being United Arab Emirates and Kuwait.

Arab travelers. There were few if any inns or hotels across most of Afghanistan, and so guesthouses were first built by the government in the 1980s to house Arab missionary and relief workers. Guesthouses became the most common form of lodging for Arab travelers to Afghanistan. In most cases, guesthouses were nondescript clay or concrete houses that served as hotels. Much like European hostels, Afghani guesthouses provided spare but inexpensive accommodations and attracted young travelers.

16. Guesthouses were communal environments where guests shared food, chores, and worship, so travelers often sought out guesthouses affiliated with their nationality, culture, and language. Some guesthouses were used by jihadists en route to training camps, and, undoubtedly, an interested person could find information about such training camps by inquiring at some guesthouses. However, many guesthouses housed only Arab missionaries with no interests in engaging in jihad, or random travelers to or from Afghanistan, and did not house jihadists. The makeup of guests at any particular guesthouse might change over time, so that a guesthouse once frequented by jihadists might later become a guesthouse frequented only by missionaries or tourists, and vice-versa. Thus, an attempt to associate a particular guesthouse with terrorism is unreliable, at best, and certainly a person's mere presence at a guesthouse,

even a guesthouse at one time populated by jihadists, would not support the conclusion that the person was a jihadist or terrorist affiliate.

17. A major activity of Islam is providing charity. Thousands of Arabs traveled to Afghanistan and Pakistan in the 1980s and 1990s to engage in relief work among the millions of Afghan refugees (the world's largest refugee population) which fled the war against the Communists in Afghanistan. Relief workers also helped provide food, shelter, medical care, and education for the impoverished Afghani population. Saudi Arabia, in particular, ran charities that sent Muslim missionaries to Afghanistan, but similar efforts took place in Yemen, UAE, Kuwait, and other Arab Gulf states. Assisting the poor and uneducated in this way was viewed by Muslim missionaries as a matter of religious obligation.

18. Another vital aspect of the Islamic faith is da'wa ("preaching"), which involves proselytizing to potential converts or simply teaching the faith -- the Islamic equivalent of Christian missionary activities. Arab missionaries to Afghanistan taught classes on the tenets and fundamentals of the Qur'an and of Orthodox Islam. Teaching the basics of Islam to the superstitious Afghanis (i.e., engaging in da'wa) was common in all Afghan refugee camps. Arab Gulf Muslims, including Yemenis, were highly favored as teachers due to their use of an Arabic dialect

that closely resembled the classical language of the Qur'an.

19. In addition, millions of Afghani refugees lived in squalor in camps across Afghanistan and Pakistan, and Arab doctors ministered to them in much the same way as do doctors with the organization Doctors Without Borders. Again, such charitable relief work is a major activity in Islam and often goes together with preaching among the poor Afghan refugees. Many Arab doctors would take time off from their regular practices to go on relief tours in Afghanistan to tend to refugees. These doctors sometimes received zakat ("tithe") money from mosques to pay for their travel and expenses.

20. While some foreign Muslims in Afghanistan undertook military jihad in order to defend the Islamist government of Afghanistan, many Muslims were not interested in such fighting. Devout Muslims engaged in lifelong struggle for improved spirituality, and this spiritual struggle included commitment to charity work, relief activities, and missionary work, or da'wa. It was common during the time of the Islamist Taliban government in Afghanistan to find Arab living and working in the country who were in no way involved in military jihadist efforts.

21. Many Yemeni and other Arab missionaries traveled to Afghanistan for the sole purpose of doing charity, relief, or missionary work

for poor Afghanis. These missionaries had no interest or desire to engage in military jihad and saw themselves as part of a greater spiritual struggle to improve themselves and to do their duty as Muslims. These missionaries' commitment to Orthodox Islam would have prevented them from engaging in terrorist activities such as suicide bombing or attacking civilian populations, both of which are forbidden in the Orthodox faith. Most Orthodox Muslims consider such conduct to be an unjustifiable crime against Islam.

Arab Jihad Prior to Operation Enduring Freedom

22. Also starting in the 1980s, tens of thousands of Arabs traveled to Afghanistan under the auspices of the Saudi and U.S. governments to wage a proxy war against the Soviet 40th Limited Contingent. Those who traveled from their homes to the mountains of Afghanistan were a mix of adventurers, idealists, and those who were genuinely stirred by the fate of their fellow Muslims in Soviet-occupied Afghanistan. The consensus of military historians of this period is that these foreign volunteers did not drastically alter the course of the war. Many of them went to fight for a few months, fired a few shots at the Soviets, then returned home as mujahideen -- "freedom fighters." There were in fact "jihad tours" for these so-called "Gucci jihadis" who often photographed themselves

"in action" without actually having been involved in any conflict.

23. During my time in Afghanistan with indigenous Afghan mujahideen, I collected numerous stories of the so-called *Araban* (Arabs). My hosts, including Massoud's Tajik fighters, scoffed at the Arabs and considered them spoiled, ineffectual fighters. There were never more than a few hundred Arabs in the Afghan-Soviet conflict at one time, while the local mujahideen numbered more than 200,000. In fact, Arab volunteers made a difference in only one minor battle, the 1987 Battle of Jaji fought in Paktia Province between about 25 Arabs and a platoon of Soviet *spetsnaz* ("special forces").

24. When the Afghan-Soviet War was over, many Arabs from the oppressive dictatorships of Libya, Syria, Egypt, Yemen, Algeria, Iraq, and Saudi Arabia dreamed of establishing a utopia for devout Muslims in post-Communist Afghanistan. These dreamers aimed to build a society where pure *shariah* ("Islamic law") could be practiced without the interference of the Arab intelligence services. However, a civil war lasting from 1992 to 1996 pitted Afghanistan's various ethnic groups against one another in a struggle for control of the country[2] and put that utopian dream on

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[2] In the flat plains of the north, General Dostum's Uzbeks (horse-riding Turko- Mongols descended from Genghis Khan's Golden

hold. However, the victory of the Islamist Taliban party, and their rise to power as the ruling government of Afghanistan, began the renewal of that utopian dream.

25. Those Arab volunteers who traveled across Asia and Eastern Europe to participate in armed conflicts were motivated by Islamic solidarity, not anti-American or terrorist agendas.[3] Some of the volunteers trained in camps that operated training programs started in the 1980s by the CIA, who sought to build opposition against the Soviets in cooperation with Pakistani intelligence (the "ISI").[4] One should not confuse these front-line jihadist volunteers -- who trained in camps and engaged in defensive combat, across the continent, against Serbian ethnic

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Horde) clashed with Massoud the Lion of Panjshirs's Tajiks (mountain Iranians who are Sunnis, unlike Shiite Iran). In the center of the country, the oppressed Hazaras (a Mongol people who are also Afghanistan's only Shiites) fought for independence. In the south and east, the Afghans (an Aryan people also known as Pashtuns) fought to reestablish the centralized state of Afghanistan with Afghan-Pashtuns being at the top of the ethnic hierarchy.

[3] In this respect, these foreign fighters resembled a global version of the International Brigades or Lincoln Brigades joined in the 1930s by George Orwell and Milton Wolff -- the American commander whom Ernest Hemingway famously compared to Abraham Lincoln -- to fight against Franco's dictatorship in Spain.

[4] Among these camps was the Al Farouq training camp in the Pashtun tribal lands

cleansers, Vladimir Putin's Russian forces, or Hindu security forces -- with members of Al Qaeda.

Al Qaeda, the Taliban, and Arab Jihadists

26. Al Qaeda is a terrorist organization founded in 1989 by Ayman Al Zawahiri and Osama Bin Laden in Peshawar, Pakistan. Non-specialists often speak in sweeping terms of a massive global movement known as "Al Qaeda," to include everyone from Sovietized Chechen highlanders fighting for independence to Saddam Hussein's Socialist Baath Party. The group is actually an elite terrorist organization run by Osama Bin Laden as *amir*[5] ("commander"). One must be selected to join Al Qaeda and a member is required, with only rare exceptions for highly placed operatives such as Khalid Sheikh Mohammed, to swear a *bayat* ("oath") to Bin Laden, typically in his presence. Only those who were trusted and equipped with unique skills were asked to join this organization, as opposed to the much larger front-line jihadi groups that deployed thousands of fighters.

27. Unlike various other jihadi organizations that were fighting in defense of Muslims

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[5] Also commonly spelled as "emir."

from Bosnia to Kashmir,[6] Al Qaeda, which was based in Khartoum, Sudan, during the Afghan civil war from 1992 to 1996, plotted against the Saudi regime and against the regime of President Hosni Mubarek in Egypt. Bin Laden's terrorist organization was expelled from Sudan in 1996 under joint pressure from Egypt, Saudi Arabia, and the U.S., but Bin Laden was given refuge by the then-ruling government in Afghanistan controlled by the Islamist Taliban.

28. The Islamist Taliban party was composed of Pashtun seminary students who had grown tired of northern warlords like Dostum and Massoud. Also, in the south, local Pashtun warlords had killed civilians at checkpoints, raped women, and robbed and plundered villages.[7] The long-suffering Afghani Pashtun populace greeted the early Islamist Taliban vigilantes as Robin Hood-style heroes who delivered Afghanistan from these murderous warlords. While the new laws were strict and the penalties sometimes harsh, many native Afghanis felt them necessary to bring order to the lawless Afghan society. In American terms, the Islamist Taliban were "tough on crime" and

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[6] In fact, the jihadi group fighting in Chechnya, led by Amir Khattab, considered itself a rival of Al Qaeda and nominally rejected terrorism.

[7] All told, warlords had killed as many as 50,000 people since the start of the civil war and had destroyed the Afghani capital in the process.

firm proponents of an ultra-conservative, Islamist version of "family values." However, the decision to give sanctuary to Osama Bin Laden, a self-proclaimed hero of the anti-Soviet jihad, put the Taliban on a collision course with the U.S.

29. By 1997, Bin Laden had decided to strike not only the Egyptian and Saudi regimes but also the U.S., the so-called "Far Enemy." In 1998, Bin Laden's terrorists struck at U.S. embassies in Kenya and Tanzania, killing hundreds of innocent people (mainly Africans). In 2000, Bin Laden's followers also tried sinking the U.S.S. Cole in the Port of Yemen and attempted the so-called Millennium Plots against the U.S. Then, of course, there were the 9/11 Attacks carried out by the elite Al Qaeda sleeper cell led by Mohammad Atta.

30. Al Qaeda members fit what has become known in counter- terrorism circles as the "Sageman Profile," -- a profile first developed by ex-CIA agent and forensic psychologist, Marc Sageman, author of Understanding Terrorist Networks (University of Pennsylvania Press 2004).[8] The Sageman Profile describes Al Qaeda terrorists as white-collar, skilled, multi-lingual (usually speaking a Western language), wealthy,

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[8] For more on the Sageman Profile see "Profile of Suicide Terrorist Defies Common Stereotypes." U.S. Embassy Documents and Texts available at: http://www.usembassy.or-.uk/terror745.html.

well-educated, and equipped with special talents advantageous to the organization. Mohammad Atta, for example, spoke English and German and earned a Master of Arts degree in Architecture from a German University. Other team members in Atta's cell could fly planes; Bin Laden was a millionaire; Al Zawahiri was a doctor; still other Al Qaeda members were explosive experts, etc. Al Qaeda especially sought members with the capacity to infiltrate western countries. Obviously, the majority of Arabs who traveled to Afghanistan after 1996 do not fit the Sageman Profile.

31. The vast majority of Arabs in Afghanistan in the 1990s and up until the 9/11 Attacks *were not* singled out to become members of Al Qaeda. There were as many as 35,000 to 40,000 Arabs in Afghanistan prior to the 9/11 Attacks, and less than a thousand of them were selected to join the terrorist organization. Further, the training camps in Afghanistan were not designed to teach terrorism. Most attendees were training for jihad against repressive governments in Baathist Iraq, Libya, etc., or to defend Muslims in places like Kashmir or Chechnya.[9] Some Arabs went to training camps to prepare themselves to defend the

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[9] Other national jihadist groups were training for guerilla war against President Islam Karimov's dictatorship in Uzbekistan, Qaddafi in Libya, Assad in Syria, Hussein in Iraq, the Russians in Chechnya, etc.

Islamist utopia in Afghanistan against the anti-government forces that later became known as the Northern Alliance.[10] It is error to argue that participation in a training camp alone is proof of membership in either Al Qaeda or the Taliban.

32. Many Arab jihadists' only affiliation with the Islamist Taliban was their support for the idea of Islamist government.[11] At the end of the Afghan Civil War in 1996, the Islamist Taliban controlled approximately ninety percent of Afghanistan and was actively opposing competing Afghani warlords, including Dostum's horse-mounted Uzbek guerillas in the high peaks of the northern Hindu Kush Mountains and Massoud's Tajik resistance in the northeast. The Afghan government opposed and repelled the anti-government forces using conventional, frontal warfare. The Islamist Taliban had an Air Force and an Army, which included Artillery Corps, Infantry Corps, and Tank Corps. In 2001, there were several thousand

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[10] When asked to name their enemy, most Arabs in the late 1990s and early 2000s would give the name of one of the northern warlords -- Dostum or Massoud. The "Northern Alliance" was a phrase used by western media to describe the collection of warlords that lost control of the Afghani government when the Taliban took over in 1996.

[11] Although never officially recognized by the U.S., it is nonetheless true that the Islamist Taliban were the de facto (if not also the de jure) ruling government of Afghanistan from the end of the Afghan Civil War in 1996 until their ouster by the U.S. at the end of 2001.

Arabs embedded in the Afghan infantry defending the front lines from northern warlords whose forces comprised the Northern Alliance. Obviously, Arab immigrants who were dug into trenches on the perimeter had no involvement in the 9/11 plot or other terrorist plans concocted by Al Qaeda.

33. Actually, the enemies of the Arab fighters in Afghanistan also were disfavored initially by the U.S. Warlords like Dostum and Massoud, who were major figures in the Northern Alliance, received funding from Shiite Iran, from Russia, and from the sale of opium. For these reasons, and due to their bad human rights records, Northern Alliance warlords received no help from the U.S. government or NATO prior to the U.S. invasion in 2001. The reality is that Arab jihadists in the late 1990s and early 2000s were defending the sovereign nation of Afghanistan from armed, anti-western warlords and drug traffickers.

34. Most jihadists found terrorism "unmanly" and rejected targeting unarmed civilians as cowardly. As one of the few scholars who have spent time on the ground investigating Arab jihadists for the U.S. intelligence community, my work has led me to the conclusion that many of these foot soldiers rejected terrorism. In 2003, I filmed interviews of captured fighters proudly boasting of their love of jihad but adamantly rejecting terrorism against civilians. Such

comments differ radically from the gloating of Al Qaeda leaders such as Bin Laden and Al Zawahiri, and others fitting the Sageman Profile, who relished terrorism.

Role of Immigrant Jihadists

35. Few if any of the Arab fighters would have known even a little about Al Qaeda or been invited to join its inner circle. Most importantly, these fighters, unlike the clandestine sleeper cell members who infiltrated the U.S. prior to the 9/11 Attacks, were engaged in open hostilities against an enemy, the Northern Alliance, that was defined even by the U.S. prior to the 9/11 Attacks as an unsavory collection of Iranian-backed warlords. Not many of the volunteers who came to Afghanistan to defend the government were skilled soldiers. While there were some, from Egypt in particular, who had fulfilled national service obligations and had military backgrounds, most volunteers had no military experience at all. Various national jihadi groups from Afghanistan, Tunisia, Kuwait, Libya, Algeria, Egypt, Jordan, China, Uzbekistan, and Chechnya provided these volunteers with training, and most volunteers were receptive and disciplined. However, not everyone was cut out for war.

36. The case of the "Tipton Three" -- three British Muslims who crossed into Afghanistan after the 9/11 Attacks, in October 2001, and volunteered to defend the

Islamic state -- is instructive. When the U.S. bombing began, the three, who had no military training and were never accused of being part of Al Qaeda, fled with the rest of their unit before being captured. The Tipton Three were kept in Guantanamo Bay until 2004, when they were repatriated to the United Kingdom and released the following day without charge. Few in Britain consider the Tipton Three to be Al Qaeda members; they were bungling jihadi-amateurs who were clearly out of their league in the war between Afghanistan and the U.S.-led military coalition.

37. Other individuals like the members of the Tipton Three served in various support and logistic roles for the Islamist Taliban out of a feeling of religious solidarity or volunteerism, similar to the feeling that drove Ernest Hemingway to fight alongside Spaniards against Franco. Many felt that the Islamist Taliban government was the purest Islamic state on earth and was actively constructing a *shariah*- based Islamic society. Some gave their lives in the trench warfare between the Islamist Taliban government and the Northern Alliance warlords. However, there also were many "Gucci jihadis" among the foreign fighters who made little to no real contribution to the war.

38. Those Yemenis who participated in the fight against the Northern Alliance as infantry grunts in the trenches were quite unlikely to

be part of the Al Qaeda organization.[12] Al Qaeda sought to identify elite fighters with the proper fundamentalist motivations to include as members in terrorist cells. Al Qaeda would not send its recruits to fight in the trenches of Northern Afghanistan; they would remove such individuals from training camps altogether. The benefit of hindsight and historical fact makes clear that not all Arab fighters in Afghanistan during this period of time were affiliated with Al Qaeda.

39. As the Afghan Civil War surged across Afghanistan, and various national jihad groups trained for localized jihad in places like Uzbekistan, China, and Chechnya, Al Qaeda hatched a plot to attack the U.S. This plan called for inserting an *akhund* ("cell") into the U.S. to strike at strategic targets. On September 11, 2001, (a day known to Al Qaeda as "Holy Tuesday,") terrorists crashed jumbo jetliners into the Twin Towers of the World Trade Center and into the Pentagon, and crashed a fourth airplane full of American civilians into a field in Pennsylvania.

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[12] It is notable that Yemenis were not used in either the bombing of the U.S.S. Cole, which took place in Yemeni waters, or in the attacks on the United States that took place on September 11, 2001.

U.S. Response to 9/11

40. Many in Afghanistan did not know that Bin Laden's Al Qaeda terrorist group was responsible for the 9/11 Attacks. In 2003, I learned during interviews of fighters held in General Dostum's prison in Sheberghan that when word reached the front lines that the U.S. was coming to Afghanistan to strike Al Qaeda targets, the government supporters assumed the U.S. would once again launch cruise missile strikes against training camps. Those fighters in the trenches facing the northern warlords (i.e. combatants who were not involved with Al Qaeda) seemed to have no real conception of how dangerous their positions had just become. These fighters, including the Tipton Three and men like them, had not come to Afghanistan to wage war with the distant Americans and did not know they were to be targeted.

41. Nevertheless, the front line with the Northern Alliance had indeed been targeted. The U.S. considered everyone from the Afghani military to Arab jihadists -- both of whom only were participating in the intra-state conflict between the Taliban government and the Northern Alliance insurgency -- as the enemy. By mid-September, the CIA's Counter Terrorism Center and Richard Clarke, the White House's chief counter-terrorism advisor, had devised a plan known as the Blue Sky Memo to liaise with Dostum and Massoud's forces to launch a coalition offensive against the

Islamist Taliban government. The pre-existing intra-state war between the Islamist Taliban and the northern warlords would undergo a paradigm shift as the U.S. joined with the warlords of the north to destroy the regime that had offered safe haven to Al Qaeda.

42. On October 7, 2001 the U.S. and its NATO ally, Great Britain, commenced the war by launching a cruise missile barrage on Taliban positions facing the Northern Alliance. Hundreds of Pashtun Taliban and Arab jihadists who were in no way involved with the 9/11 Attacks died on the first day of this new "war" on terrorism. It soon became obvious that anyone from the average illiterate Pashtun tribal *lashkar* ("militiaman") draftee, to scores of Arab jihadists who only the month before were fighting anti-government warlords rejected by western governments, was considered almost overnight to be an enemy of the U.S.

43. While the initial waves of attacks did not inflict mass casualties, by November the U.S. aerial attacks had become devastating. The U.S. military was hitting the Islamist Taliban forces in their trenches with everything from 2,000 pound JDAM smart bombs to cannon fire from AC-130 Specter gunships. It was hardly battle. The lightly armed fighters who had signed up to wage war against the anti-government Northern Alliance warlords died in the thousands (perhaps as many as 9,000 killed) as the

U.S. entered the fray. The U.S. deployed massive daisy cutters (the world's largest non-nuclear bomb), thermobaric "bunker busters," carpet bombs, and cluster bombs, and the outmatched government fighters quickly abandoned their exposed trenches and fled. The targeted bombing campaign effectively destroyed the Islamist Taliban's military capacity -- both its Air Force and Army.

44. While traveling across northern Afghanistan in 2003, collecting accounts of the Northern Alliance victory and talking to prisoners under the custody of General Dostum, I learned that there were no more than 300 U.S. troops on the ground during the offensive and that few if any of the targeted Arabs ever saw an American. General Dostum himself found it ironic that Arabs were taken to the Caribbean "as if by aliens!" (in Dostum's words) as prisoners of the United States. Those Arab jihadists who fled the front lines of the battle with the Northern Alliance were leaving a fight against the wrong opponent, against whom they were severely outmatched, despite having had no intention of fighting that opponent at any time before, during, or after the U.S. offensive.

45. Many Arab survivors of the initial assault, both jihadists and missionaries, retreated to the northern city of Kunduz and surrendered *en masse* to escape the unexpected U.S. aerial bombardments. From there they were

taken into custody by the Northern Alliance forces of General Dostum. Hundreds of these Arab prisoners, (including some who were not jihadists and who played no military role whatsoever,) were gunned down by General Dostum's troops, and others died in a doomed uprising in the Qala i Jangi fortress. Some Arab fighters attempted to leave Afghanistan altogether, escaping by way of the same route they used to enter the country -- through Pakistan. The real "war" -- international armed conflict between the U.S. and the then-ruling government of Afghanistan -- ended in just over a month (October 7th to November 8th).

46. Both General Dostum's and Massoud's people gave me video footage of the results of U.S. aerial bombardments, and I interviewed survivors of the attacks. Those I interviewed were shocked and horrified to find themselves targets of the U.S. military. They had never planned on fighting "beeping joe dos" (B-52s) when they joined the fight against the Northern Alliance. Arab missionaries and other non-jihadist Arabs in Afghanistan similarly had no idea that they would ever become American military targets simply for their *presence* as Arabs in Afghanistan. By November, though, thousands of Arabs realized that it was not safe to remain in Afghanistan and fled for their lives. Many, including Arab jihadists fleeing the front lines as well as non-jihadist Arab missionaries and charitable workers, fled in caravans for mutual assistance.

However, these caravans were attacked by U.S. *avcis* ("hunters") -- F-18s and other strike aircraft flying from U.S. aircraft carriers. Just as for some jihadists, departure back through Pakistan was the best hope for many Arabs. However, Pakistani authorities rounded up Arabs crossing the border and many were "sold" to the U.S. for bounties.

Rise of the Neo-Taliban

47. Having won their unexpected victory, the Northern Alliance celebrated by ethnically cleansing Pashtuns from their regions and repealing the laws and policies of the Islamist Taliban. The actions of the Northern Alliance fomented a successor insurgency, the "Neo-Taliban," which has charted a distinctly nationalist course and become politically separate from the foreign Arab jihadists that supported the Islamist Taliban. Many Afghans whom I have interviewed, and who currently suffer under the Iranian-backed Northern Alliance warlords, fondly look back upon the era of Islamist Taliban government. The Neo-Taliban have exploited that nostalgia and have made substantial inroads in vast swathes of the country by way of support from average Afghanis disaffected by the present government.

48. It would be a gross mistake to confuse the Islamist Taliban (the former ruling government of Afghanistan) with the Neo-

Taliban (a nationalist insurgency of disaffected Pashtuns). The Islamist Taliban were uncompromising enforcers of a strict interpretation of *shariah* law, but they were not terrorists. The Islamist Taliban did engage in public executions, but they were not performing extra-judicial beheadings or suicide bombings. The Islamist Taliban ran government ministries such as the Ministries of Health, Borders, Tribes, Roads, and Education, and many moderates in the Islamist Taliban sought to expel Bin Laden from Afghanistan.

49. The Neo-Taliban, on the other hand, used terrorist tactics to oppose and antagonize the Northern Alliance warlords who wrested power back in the wake of the post-9/11 US. military action.[13] The close association that formerly prevailed between the Islamist Taliban and Arab immigrant supporters, who together shared the goal of creating an Islamist utopia, has almost no likelihood of repetition. Certainly as long as the Neo-Taliban is engaging in terrorist tactics such as suicide bombings and attacks on innocent civilian populations, Arab immigrants would find cooperation and assistance repugnant as a gross violation of Islamic law.

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[13] Hamid Karzai, President of Afghanistan and a native Pashtun, has since removed many of these Northern Alliance warlords from positions of actual power or influence in the Afghan government.

50. The new "war" being waged by over 31,000 U.S. troops against Neo-Taliban insurgents differs fundamentally from the war between the U.S. and the Islamist Taliban government of Afghanistan before the U.S. offensive of 2001. The Neo-Taliban have become the anti-government criminals who now choose violence over democracy in their efforts to replace the current, legitimate Afghani government. As stated previously, the Islamist Taliban government of Afghanistan waged conventional warfare and had a disciplined battle order consistent with law of war principles. The same held true for the Arab jihadist components of the Taliban forces.

The Immigrant Jihadist Distinction

51. There is a clear distinction between the Neo-Taliban and most Arab jihadists who immigrated to Afghanistan to defend the former ruling government. The Arab immigrants were not terrorists but rather volunteer soldiers who fought conventionally in units with a well-defined command structure. Together with their Islamist Taliban hosts, Arab jihadists fought under a common flag known as "Al Liwa," wore black turbans to distinguish themselves as soldiers, carried their arms openly, and took defensive positions away from the civilian populations of northern Afghanistan. These jihadists did not target civilian populations but instead stood ready to defend the then-ruling Islamic government from anti-

government aggression. Some of these jihadists maintained their defensive positions for years and were among the most disciplined soldiers in the Afghan civil war.

52. It is clear to me, based on my personal and professional experience, that a nuanced approach is necessary to understand the role of Arab jihadists. Few such fighters were, became, or are Al Qaeda terrorists of the sort that infiltrated the U.S. in 2001. Terrorists do not fight frontal combat in trenches. Most of these Arab jihadists are far from the skilled, well-educated, and wealthy operators identified in the Sageman profile. Certain allegations that a petitioner is a member of Al Qaeda seem to be written without the proper understanding of the motivations and intentions of foreign Arab jihadists. Clearly, membership in a fighting unit that provided support for the Islamist Taliban government in its war against northern Afghanistan warlords is not tantamount to being a member of Al Qaeda, or even the Neo-Taliban, who are engaged in hostilities against the U.S.

53. In my professional opinion, a foreign jihadist serving on the front line of the war between the Taliban and the forces of anti-government warlords should not because of that service be considered a member of Al Qaeda or the Neo-Taliban insurgency fighting against the U.S. and Afghani forces today. Front-line fighters on the losing side of the pre-existing Afghan intra-state

conflict had no desire or intent to participate in the international conflict between the United States and Afghanistan. Rank and file Arab jihadists should not be considered Neo-Taliban just because they were fighting with the Islamist Taliban government against competing Afghani warlords who only later would be known as the "'Northern Alliance" by the western world.

54. I also do not believe that Arab missionaries or charitable workers should be considered members of the Islamist Taliban, the Neo-Taliban, or Al Qaeda, merely because they were Arabs in Afghanistan during the late 1990s and early 2000s, or because they politically supported or sympathized with the Islamist Taliban's political objective of establishing a *shariah*-based Islamic state. These missionaries and charitable workers never carried arms, never fought in military conflicts, and never otherwise supported hostilities against the United States or any other group or country. Their desire to help build an Islamic utopia in Afghanistan does not make them enemies of the United States.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 21, 2009.

/s/ Brian Williams

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Supreme Court, U.S.
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No. 10-487

In the Supreme Court of the United States

MOHAMMED AL-ADAHI, ET AL., PETITIONERS

v.

BARACK H. OBAMA, PRESIDENT OF THE UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the district court was required to examine the evidence as a whole and take into account the mutually reinforcing nature of the pieces of evidence, that the district court erred in failing to treat training at an al-Qaida training camp and staying at al-Qaida guesthouses as evidence that would support a finding that petitioner was "part of" al-Qaida, and that some of the district court's findings of fact were clearly erroneous.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 613 F.3d 1102. The opinion of the district court (Pet. App. 25a-62a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 23a-24a) was entered on July 13, 2010. The petition for a writ of certiorari was filed on October 10, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Al-Adahi (petitioner) is an alien detained at the United States Naval Station at Guantanamo Bay, Cuba, under the Authorization for Use of Military Force

(AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001). He petitioned for a writ of habeas corpus, and the district court granted the writ and ordered his release. The court of appeals reversed. Pet. App. 1a-22a.

1. In response to the attacks of September 11, 2001, Congress enacted the AUMF, which authorizes "the President * * * to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." AUMF § 2(a), 115 Stat. 224. The President has ordered the Armed Forces to subdue both the al-Qaida terrorist network and the Taliban regime that harbored it in Afghanistan. Armed conflict with al-Qaida and the Taliban remains ongoing, and in connection with that conflict, the United States has seized many hostile persons and detained a small fraction of them at Guantanamo Bay.

Many of the detainees at Guantanamo Bay have filed petitions for writs of habeas corpus. See *Boumediene* v. *Bush*, 553 U.S. 723 (2008). In those proceedings, the Court of Appeals for the District of Columbia Circuit—where appeals in all the habeas proceedings for detainees held at Guantanamo Bay are heard (see *id.* at 795-796)—has construed the AUMF to provide that the government may establish the lawfulness of military detention by showing, among other things, that the habeas petitioner "is 'part of' al-Qaida, the Taliban, or associated forces." Pet. App. 4a. The court has recognized that it is "impossible to provide an exhaustive list of criteria for determining whether an individual is 'part of' al Qaeda." *Bensayah* v. *Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010). Instead, the determination "must be made on a case-by-base basis by using a functional rather than

a formal approach and by focusing upon the actions of the individual in relation to the organization." *Ibid.*

Although evidence of following or acting under instructions or directions within the military command structure of al-Qaida or the Taliban would normally establish that an individual was "part of" enemy forces, a lawful basis for detention may be established in other ways as well. See *Bensayah*, 610 F.3d at 725; *Al Odah* v. *United States*, 611 F.3d 8, 16 (D.C. Cir. 2010).[1] For example, evidence that an individual attended al-Qaida training camps and stayed at al-Qaida guesthouses or safehouses, which are not generally open to members of the public, can be "'overwhelming' evidence that the United States had authority to detain that person." Pet. App. 16a.

2. Petitioner, a detainee at Guantanamo Bay, sought a writ of habeas corpus. Following an evidentiary hearing, the district court granted the writ and ordered petitioner's release. Pet. App. 25a-62a.

The district court focused on five categories of government evidence. The court first found that "the record fully supports the Government's allegations that Petitioner had close familial ties to prominent members of the jihad community in Afghanistan." Pet. App. 37a. The court found that petitioner's sister had married a

[1] Many of al-Qaida's operations are carried out by cells acting with significant autonomy, but taking direction from al-Qaida leadership. See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2109 & nn. 279-280 (2005) (collecting sources). Moreover, individuals affiliated with al-Qaida typically seek to hide their affiliation. They do not wear uniforms or carry "official membership card[s]," *Al-Bihani* v. *Obama*, 590 F.3d 866, 873 (D.C. Cir. 2010), petition for cert. pending, No. 10-7814 (filed Nov. 29, 2010), and they may purposefully attempt to disguise their connection to the organization.

man who was so close to Usama bin Laden, al-Qaida's leader, that bin Laden had hosted a celebration of the couple's wedding in Kandahar. *Id.* at 38a-40a. In addition to meeting bin Laden at the wedding celebration, petitioner had a private meeting with bin Laden a few days later. *Id.* at 40a. Noting petitioner's testimony that "meeting with bin Laden was common for visitors to Kandahar," the district court concluded that petitioner's "familial ties to Usama bin Laden" and his meetings with bin Laden were "distract[ions]" that did not "prove that [petitioner] was a member of al-Qaida's 'armed forces.'" *Id.* at 41a (quoting *Gherebi* v. *Obama*, 609 F. Supp. 2d 43, 71 (D.D.C. 2009)).

Second, the district court found that petitioner had admitted staying at al-Qaida's al-Nebras guesthouse. Pet. App. 41a-43a. Evidence before the court established that al-Nebras was a staging-post for recruits traveling to the Al Farouq paramilitary training camp, but the court stated that "the guesthouse evidence is not in itself sufficient to justify detention." *Id.* at 42a; see *id.* at 13a.

Third, the district court found that petitioner had also admitted attending "al-Qaida's Al Farouq training camp," Pet. App. 43a, and "receiv[ing] training while there," *id.* at 44a. The district court noted petitioner's statements that he had "sought general weapons training and 'Islamic education'" at Al Farouq, and had "pursued [paramilitary] training" there in order "to satisfy 'curiosity' about jihad, and because he found himself in Afghanistan with idle time." *Id.* at 44a-45a. The district court declined to treat petitioner's decision to train at an al-Qaida paramilitary facility as evidence that he was part of al-Qaida. Crediting petitioner's assertion that he had been expelled from Al-Farouq "for failing to comply

with the rules" prohibiting smoking, *id.* at 16a, 45a, the court reasoned that petitioner's "demonstrated unwillingness to comply with orders from individuals at Al Farouq" showed that petitioner was not part of al-Qaida, *id.* at 47a. The district court found it insignificant that instead of being punished by al-Qaida after his expulsion from Al-Farouq, petitioner returned to Kandahar to stay with his "powerful brother-in-law," the close associate of Usama bin Laden. *Id.* at 46a. In the court's view, "this fact demonstrates at most that [petitioner] was being protected by a concerned family member; it most certainly is not affirmative evidence that [petitioner] embraced al-Qaida, accepted its philosophy, and endorsed its terrorist activities." *Id.* at 47a.

Fourth, the district court disregarded the government's evidence that petitioner had "more than a passing familiarity" with Usama bin Laden's personal bodyguards. Pet. App. 55a. The court acknowledged that petitioner's knowledge of the men suggested more than just a casual relationship between petitioner and bin Laden's security detail, but it declined to "credit this evidence as sufficient corroborative information to help carry the Government's burden." *Id.* at 56a.

Fifth, the district court accepted the government's evidence that petitioner had remained in Afghanistan in 2001 after the United States began combat operations in that country against al-Qaida and the Taliban. The court acknowledged that bin Laden had directed al-Qaida members to remain in Afghanistan and fight, Pet. App. 57a, and it found that petitioner had traveled around Afghanistan after the American military campaign began, *id.* at 61a, had been wounded, *id.* at 58a, and had eventually been captured fleeing Afghanistan on a bus in the company of Taliban fighters, *id.* at 59a.

Without "statements or confessions to support" the allegation that petitioner had fought for al-Qaida or the Taliban, however, the district court concluded that the government lacked "affirmative evidence of this allegation." *Id.* at 57a.

Summing up the evidence, the district court stated that "[w]hile it is tempting to be swayed by the fact that Petitioner readily acknowledged having met bin Laden on two occasions and admitted that perhaps his relatives were bodyguards and enthusiastic followers of bin Laden, such evidence—sensational and compelling as it may appear—does not constitute actual, reliable evidence that would justify the Government's detention of this man." Pet. App. 61a-62a. The court ordered the government to make arrangements for petitioner's release "forthwith." *Id.* at 62a.

3. The court of appeals reversed. Pet. App. 1a-22a. The court of appeals held that it was "manifestly incorrect—indeed startling"—for the district court to conclude that the record contained no reliable evidence that petitioner was part of al-Qaida. *Id.* at 9a. Instead, reviewing the substantial evidentiary record, the court held that "there can be no doubt that [petitioner] was more likely than not part of al-Qaida." *Id.* at 21a. The court concluded that the district court had committed reversible error in that it "clearly erred in its treatment of the evidence," reaching a conclusion that "was simply not a 'permissible view[] of the evidence.'" *Id.* at 20a (quoting *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 574 (1985)).

The court of appeals held that the district court had improperly examined each item of evidence in isolation and had mistakenly believed that "if a particular fact does not itself prove the ultimate proposition (*e.g.*,

whether the detainee was part of al-Qaida), the fact may be tossed aside and the next fact may be evaluated as if the first did not exist." Pet. App. 8a. The appellate court identified several specific examples of that erroneous approach in the district court's opinion. *Id.* at 8a-9a.

For example, the court of appeals explained that the evidence of petitioner's close personal ties to al-Qaida's inner circle, including a relationship by marriage with an individual with "'very high status' in al-Qaida" and personal meetings with bin Laden himself, Pet. App. 10a-11a, helped to make it "far more likely" that petitioner himself "was or became part of the organization," *id.* at 12a. For similar reasons, petitioner's stay at the al Nebras guesthouse "greatly strengthened the government's case." *Id.* at 13a. Al Nebras was "not just another gathering place," but rather was "a staging area for al-Qaida recruits en route to the Al Farouq training camp." *Ibid.* Thus, petitioner's "voluntary decision to move to an al-Qaida guesthouse, a staging area for recruits heading for a military training camp, makes it more likely—indeed, very likely—that [petitioner] was himself a recruit." *Ibid.*

Similarly, the court of appeals observed that petitioner's attendance at al-Qaida's Al Farouq paramilitary training camp showed that petitioner had "received and followed orders" from al-Qaida. Pet. App. 15a. "[A]ttendance at an al-Qaida military training camp is therefore—to put it mildly—strong evidence that [petitioner] was part of al-Qaida." *Id.* at 16a. The court of appeals further determined that the district court had erred in disregarding petitioner's training at Al Farouq on the basis that petitioner had been expelled from the camp for smoking; petitioner's "violation of a rule or rules did not erase his compliance with other orders," just as

"[o]ne would not say that an Army trainee ceased to be part of the Army if he failed to shine his shoes or overslept one morning." *Ibid.*

As another example of the same pervasive error in the district court's analysis, the court of appeals discussed petitioner's knowledge of personal details about bin Laden's personal bodyguards. The court of appeals stated that petitioner's "detailed personal knowledge" about bin Laden's bodyguards was strong evidence of petitioner's "close relationship with these men and thus strengthened the probability that he was part of al-Qaida." Pet. App. 17a.

Finally, the court of appeals held that the district "court was wrong, and clearly so," when it determined that there was no evidence that petitioner had been part of a band of fighters fleeing Afghanistan when he was captured. Pet. App. 19a. The court of appeals observed that petitioner had given inconsistent explanations for what he had been doing during the period of the American military offensive in Afghanistan, that he had been injured seriously enough to require hospitalization, and that he had been captured on a bus with wounded fighters. *Ibid.* Those pieces of evidence, the court of appeals held, while not in themselves conclusive, "add to the weight of the government's case," and "the district court clearly erred in tossing them aside." *Ibid.*[2]

ARGUMENT

Petitioner argues (Pet. 13-28) that the court of appeals erred in setting aside the district court's finding

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[2] The court of appeals also observed that "[o]ne of the most damaging and powerful items of evidence against [petitioner] is classified." Pet. App. 21a. That evidence cannot be described in detail in this public filing, but it will be made available to the Court on request.

that he was not a part of al-Qaida. The court of appeals correctly held that the district court committed several legal errors in evaluating the evidence, and that its findings were clearly erroneous. That factbound determination does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The court of appeals correctly held that the facts established by the government were more than sufficient to show that petitioner was part of al-Qaida. As the court of appeals explained, the district court's contrary ruling was premised on a legally erroneous approach to the record—looking at each piece of evidence in isolation and asking whether that item, standing alone, established that petitioner was part of al-Qaida. This Court has long disapproved of that type of analysis of trial evidence, and there is accordingly no conflict between the court of appeals' decision here and any decision of this Court or any other court of appeals. See, *e.g.*, *Bourjaily* v. *United States*, 483 U.S. 171, 179-180 (1987) ("[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in culmination prove it," because the "sum of an evidentiary presentation may well be greater than its constituent parts."); *United States* v. *Pugliese*, 153 F.2d 497, 500 (2d Cir. 1945) (L. Hand, J.) (noting that, even in criminal cases, "most convictions result from the cumulation of bits of proof which, taken singly, would not be enough in the mind of a fair minded person").

Petitioner errs in asserting (Pet. 13) that the court of appeals imposed "'conditional probability' as a standard of appellate review" in non-jury cases. Contrary to petitioner's apparent view that "conditional probability" is a novel legal standard (Pet. 17-18), it is instead a term

the court of appeals used in its opinion to describe a commonplace element of sound logical reasoning. The court of appeals explained what it meant by the term by giving an example: "the probability that a person chosen at random from the phone book is over 250 pounds is quite small," but "if it's known that the person chosen is over six feet four inches tall, then the conditional probability that he or she also weighs more than 250 pounds is considerably higher." Pet. App. 8a (quoting John Allen Paulos, *Innumeracy: Mathematical Illiteracy and Its Consequences* 63 (1988)). Because the court of appeals did not create a new legal standard but merely emphasized a principle of reasoning that is consistent with this Court's decisions, petitioner is mistaken in arguing that the court's holding is inconsistent with standards of appellate review. Indeed, in a more recent Guantanamo Bay habeas appeal, the court of appeals has reaffirmed "that a [district] court considering a Guantanamo detainee's habeas petition must view the evidence collectively rather than in isolation." *Salahi* v. *Obama*, No. 10-5087, 2010 WL 4366447, at *7 (D.C. Cir. Nov. 5, 2010). Although the court in that case did not use the term "conditional probability," it expressly "reiterate[d] this Court's admonition in *Al-Adahi*" that the district courts' consideration of the evidence in the habeas proceedings should not be "unduly atomized." *Id.* at *7-*8.

Petitioner repeats the error of the district court when he argues (Pet. 23) that "string[ing] together six or seven facts, each with a non-culpable inference, does not prove the important conclusion—that [petitioner] became part of al-Qaeda." As an initial matter, the individual pieces of evidence in this case were hardly innocuous. More importantly, as the court of appeals recog-

nized, each fact tending to establish that petitioner was part of al-Qaida—from petitioner's close personal ties to al-Qaida's most senior leader, to his obtaining weapons training at an al-Qaida camp and being captured in the company of wounded fighters—significantly increased the likelihood that petitioner was part of al-Qaida. Pet. App. 9a. In addition, the government produced "damaging and powerful" classified evidence that petitioner was part of al-Qaida. *Id.* at 21a. The court of appeals recognized that it would be inherently highly improbable for all of those facts to be true of an individual who was *not* part of al-Qaida. Thus, far from "stringing together" isolated facts, the government presented a number of facts related to al-Qaida activities, which, taken as a whole, constituted a compelling showing that petitioner was part of al-Qaida.

2. The court of appeals also correctly identified other legal errors in the trial court's evaluation of the evidence. In addition to failing to consider the evidence as a whole, Pet App. 8a-9a, the district court's "series of legal errors," *id.* at 20a, included at least these: it disregarded, as a "distraction," evidence of petitioner's close personal ties to senior al-Qaida leaders, *id.* at 13a; it failed to recognize that staying in an al-Qaida guesthouse and undertaking weapons training at an al-Qaida military training camp were evidence that petitioner was part of al-Qaida, *id.* at 13a-14a; it erroneously reasoned that if petitioner smoked at Al Farouq, then he had not taken orders from al-Qaida there, *id.* *at* 16a; it dismissed petitioner's training at Al Farouq on the ground that this evidence was insufficient to prove that petitioner "embrace[d] every tenet of al-Qaida," *id.* at 15a; and it failed to ask whether petitioner "was generally a credible witness or whether his particular explanations

for his actions were worthy of belief," *id.* at 19a. The court of appeals did not err when it reversed the trial court's decision on the basis of those obvious and pervasive errors.

Petitioner argues (Pet. 16) that the court of appeals was required to leave the district court's flawed analysis intact because "the crucial evidence was the live testimony" of petitioner himself. There is no basis in the record for concluding that petitioner's statements played a significant part in the district court's decision. As the court of appeals pointed out, the district court did not hold that petitioner was credible or determine "whether his particular explanations for his actions were worthy of belief." Pet. App. 19a. Instead, without deciding between the alternative versions of events, the trial court concluded that the government had failed to carry its burden of proof on particular issues, "display[ing] little skepticism about [petitioner's] explanations for his actions," despite their inconsistencies and implausibility, while at the same time expressing doubts about the government's case "on the mistaken view that each item of the government's evidence needed to prove the ultimate issue in the case." *Id.* at 20a. As the court of appeals correctly held, such reasoning is wrong.

Moreover, an appellate court may reverse findings based upon witness testimony if "[d]ocuments or objective evidence * * * contradict the witness' story," or if the story itself is "so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it." *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 575 (1985). Here, the court of appeals correctly pointed out that allegations that bin Laden held casual meetings with any visitor to Kandahar were "utterly

implausible" because bin Laden was, at the time, in hiding under tight security. Pet. App. 11a.

Petitioner responds with a new rationale (Pet. 20) for his one-on-one meeting with bin Laden: bin Laden supposedly "met newcomers to Kandahar to determine if they were dangerous to him." The petition does not explain why Usama bin Laden, after sitting next to petitioner during the meal to celebrate the wedding between bin Laden's bodyguard and petitioner's sister, Pet. App. 11a, might believe a second meeting "to check out" petitioner (Pet. 4 n.2) would be necessary. Nor is it plausible that bin Laden would arrange for in-person meetings with strangers in order to determine whether they were dangerous. Petitioner's explanation also does not address other basic improbabilities in his story, such as why a father of two young children from Yemen, Pet. App. 66a, would, during a supposed vacation in Afghanistan, casually decide to undertake paramilitary training and "learn using weapons," *id.* at 80a, or why such a person would choose to extend his vacation once the United States began military attacks on that country. The record fully supports the court of appeals' conclusion that elements of petitioner's story were simply incredible, and in any event, that factbound issue does not warrant this Court's review.[3]

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[3] Petitioner's accusation (Pet. 24) that the court of appeals "ma[de] up facts not in the record, such as its paragraph devoted to the Al Qaeda training manual for resisting interrogation," is unfounded. A declaration describing al-Qaida's counter-interrogation techniques was in the record below. C.A. App. 308-309. Al-Qaida counter-interrogation techniques are relevant to petitioner because, as the court of appeals recognized, if petitioner had been trained in those techniques (for example, during his paramilitary training at Al Farouq), that training would increase the likelihood that petitioner would lie to military interrogators.

3. Petitioner argues (Pet. 27) that this court should grant review to determine whether staying at an al-Qaida guesthouse and training at an al-Qaida training camp would be sufficient, standing alone, to show that an individual is part of al-Qaida. The court of appeals concluded that petitioner's stay at the al-Nebras guesthouse and weapons training at Al Farouq were "powerful" evidence that petitioner was part of al-Qaida, Pet. App. 14a, especially given that the guesthouse "served as a staging area for al-Qaida recruits en route to the Al Farouq training camp," *id.* at 13a, and "[a]t least eight of the September 11th hijackers had trained at Al Farouq," *id.* at 14a, before launching the al-Qaida attack. The court of appeals was correct to recognize that petitioner's decision to seek out and obtain weapons training at Al Farouq is highly probative of whether he was part of al-Qaida.

The court of appeals did not hold, however, that the guesthouse and training-camp evidence would necessarily have been sufficient on their own, and because of all of the other evidence in the record, this case would be a poor vehicle for resolving that issue. The government also presented evidence that petitioner's travel from Yemen to Afghanistan had been arranged and paid for by al-Qaida, Pet. App. 10a, that petitioner had access to al-Qaida's most trusted inner circle, *id.* at 11a, that when petitioner left the paramilitary training camp he returned to his brother-in-law, "one of bin Laden's most trusted associates," *id.* at 15a, that petitioner traveled among war-torn cities in Afghanistan after the United States' military operations in that country began, *id.* at 18a, and that he was captured "on a bus carrying wounded Arabs and Pakistanis," *id.* at 20a. The government had powerful classified evidence, as well, to show

that petitioner had remained in Afghanistan to fight. *Id.* at 21a. The court of appeals did not err in concluding that this evidence, as a whole, showed that it was more probable than not that petitioner was part of al-Qaida.

4. Although petitioner also suggests (Pet. 16-17) that the court of appeals erred in holding that some of the district court's factual findings were clearly erroneous, certiorari is not warranted to review that aspect of the court of appeals' holding. The courts of appeals have undoubted authority to reverse trial court decisions for clear error when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson*, 470 U.S. at 573 (quoting *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). Reversal for clear error, moreover, is appropriate when the trial court's "interpretation of the facts is illogical or implausible." *Id.* at 577. Here, the court of appeals correctly concluded that the district court committed legal and logical errors in evaluating the evidence, Pet. App. 8a-9a, 17a-18a, and that the trial court had reached a conclusion that was so implausible as to be impermissible, *id.* at 20a. But even if the court of appeals had erred in applying the clear-error standard, which it did not, the misapplication of a properly stated rule of law would not warrant this Court's review. See Sup. Ct. R. 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Acting Solicitor General is recused in this case.

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MOHAMMED AL-ADAHI, DETAINEE,
CAMP DELTA, GUANTANAMO BAY NAVAL STATION,
GUANTANAMO BAY, CUBA;
MIRIAM ALI ABDULLAH AL-HAJ,
NEXT FRIEND OF MOHAMMED AL-ADAHI,
Petitioners,

v.

BARACK OBAMA;
ROBERT M. GATES; TOM COPEMAN,
Respondents,

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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ARGUMENT

In its Brief, the government comes close to conceding that the court of appeals erred in establishing a new standard of appellate review for civil cases known as "conditional probability." Its defense is to reargue the merits and frame *Al-Adahi* as a one-off, unimportant appellate error unworthy of Supreme Court supervision. Petitioner respectfully submits it is neither. *Al-Adahi* is part of a demonstrable pattern in which the D.C. Circuit, having been reversed in *Boumediene v. Bush*, 553 U.S. 723 (2008), has thwarted that decision at every turn, creating a logjam for the many habeas cases in the pipeline and, in this case, abandoning the rule of *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985).

A. The government hardly defends the circuit's decision reversing the district court.

Al-Adahi testified live by video link from Guantánamo. The government glosses over that fact, and never confronts the circuit's fallacy that live testimony can be weighed by a rule of statistics. Only the district court heard Al-Adahi testify that he was never a member of Al Qaeda or a soldier in Afghanistan and weighed that testimony against the other, exclusively hearsay evidence.[1]

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[1] The government claims it "produced 'damaging and powerful' classified evidence that petitioner was part of Al Qaeda". Br. in Opp'n at 11. But the district court weighed the credibility of that evidence too, rejecting it as ambiguous and therefore not proving the government's point. Pet. App. 39a.

Ancient and--until now--unbroken jurisprudence teaches that only the fact finder could weigh the credibility of that testimony. *See., e.g., Kansas v. Ventris,* 129 S. Ct. 1841, 1847 n.* (2009) ("Our legal system, however, is built on the premise that it is the province of the jury to weigh the credibility . . . ."); *Maryland v. Craig,* 497 U.S. 836, 846 (1990) (observing the demeanor of a witness aids in determining credibility); *Stewart v. Sonneborn*, 98 U.S. 187, 191 (1878) (defendant's belief of the facts is always a question of credibility for the jury).[2]

Under *Anderson,* the district court should not have been reversed. Having seen Al-Adahi testify live--on both direct and the government's cross examination--and with two plausible inferences to be drawn from the evidence, the district court's factual determination that Al-Adahi was not part of Al Qaeda was not subject to second guessing.

> If the District Court's account of the evidence is *plausible* in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting

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[2] Whether facts are found by a judge or jury, seeing and hearing live testimony while considering other evidence gives the fact finder a unique role--one that can never be replaced by an appellate court reading a transcript. An essay by G. K. Chesterton paraphrased by the court in *Commonwealth v. Marple*, 26 Mass. App. Ct. 150, 161 (1988), deftly describes the gravity of the fact-finder's role: "as the jury received the case and entered the jury room, 'it seemed as if the Holy Ghost descended upon us.'" The long settled standard of review in civil cases recognizes the special role of the trial court in considering all the facts as presented.

> as the trier of fact, it would have weighed the evidence differently. *Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.*

470 U.S. at 573-74 (emphasis added).

To avoid *Anderson,* the Court of Appeals created a new[3] "conditional probability" rule permitting it to substitute its judgment for that of the district court. The fallacious basis for the rule and its use to transform a disagreement about the facts into legal error[4] are discussed in Al-Adahi's petition.[5] The circuit created a standard, contrary to *Anderson,* permitting it to substitute its own fact-finding for the district court's, even in cases involving live testimony.[6]

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[3] As discussed in the Petition, *United States v. Prandy-Binett*, 995 F.2d 1069 (D.C. Cir. 1993), was confined to probable cause determinations. *Al-Adahi* is its first use in reviewing the decision of a district court finding facts at trial.

[4] "[W]e need to mention an error that affects much of the district court's evaluation of the evidence" Pet. App. 7a.

[5] "Conditional probability" is rightly described by the dissent as "a bizarre theory" and "gobbledy-gook"--strong words--in the probable cause decision that gave rise to it. *Prandy Binett*, 995 F.2d at 1074, 1077 (dissenting opinion).

[6] The circuit's decision here is reminiscent of *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), where the Fifth Circuit examined the same evidence as the district court, and like the circuit court here, found the district court had committed error. There the issue was discriminatory intent, which the Fifth Circuit found to be an ultimate fact permitting it to make an independent determination. 456 U.S. at 285. This Court reversed holding that ultimate facts are nonetheless facts to be found by the district

That new standard is now applicable to the review of all civil non-jury trials in the D.C. Circuit.

The government's embrace of conditional probability is a chaste one. It never cites *Prandy-Binett,* instead recharacterizing the court of appeals' wholesale change in the scope of review as "a principle of reasoning that is consistent with this Court's decisions." Br. in Opp'n at 10. For that "consistency," the government cites nothing, because, following *Anderson,* the circuit courts have not run roughshod over the district courts' fact-finding. In short, the government's defense of "conditional probability" is dispirited at best.

The government never explains how the court of appeals' "new math" can be squared with a system of justice in which testimony matters and trial courts judge its credibility--making all the qualitative judgments that affect that assessment. What is the "conditional probability" that Al-Adahi testified truthfully? Which mathematical scales allow an appellate court on a cold record to reweigh live testimony against circumstantial hearsay (some of which was never argued to the district court)? In rearguing the merits of the case resolved below, the government glosses over the system-rocking import of the court of appeals decision: the wholesale rewriting of the scope of appellate review in civil cases in which the district court is the fact-finder. The government

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court. Whether a man intended to and became a member of Al Qaeda is such a fact.

reargues the facts of this case,[7] but it is precisely in close factual cases that the rule limiting the scope of review is most important. In such cases, the danger is greatest that the role of the trial court as fact-finder can be swept away.

Related to the new appellate standard of review is the court of appeals' creation in *Al-Adahi* of an irrebutable presumption. The court of appeals restated an earlier dictum from *Al-Bihani v. Obama,* 590 F.3d 866, 873 n.2 (D.C. Cir 2010), to make attendance at al Faroq or al Nebras (a guest house) "'overwhelmingly, if not definitively, [justification of] detention." Pet. App. 20a. If the government has the burden to prove by a mere preponderance of the evidence that a man was part of the fighting forces of the Taliban or Al Qaeda and offers that "overwhelming evidence", a petitioner has essentially been deprived of a meaningful defense. How exactly, might it be overcome? The government glosses over the newly created presumption that it now uses routinely against other detainees, by saying "well, there was other evidence here." But other evidence will hardly matter when the district courts see how the circuit in this case used its presumption to sweep aside any other weakness in the government's theory.

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[7] Indeed, the government spends the bulk of its Brief explaining why a reasonable fact-finder might have viewed the facts differently than the trial court did. But that, of course, is an implicit concession that the ruling of the circuit court was legally wrong under *Anderson*.

B. *Al-Adahi* is not an isolated case.

Following the Court's direction in *Boumediene v. Bush*, 553 U.S. 723, 794 (2008), the district courts in the D.C. Circuit began hearing Guantánamo habeas cases. In the cases tried, the district courts granted the petition in thirty-eight cases and denied the petition in eighteen. The circuit's decision in *Al-Adahi* controls those and many remaining cases.

At the D.C. Circuit, Guantánamo petitioners have hit a road block. Consequently, six other petitions for certiorari in Guantánamo cases are pending this term: *Al Odah v. Obama*, No. 10-439 (U.S. filed Sept. 28, 2010; *Ameiene v. Obama*, No. 10-447 (U.S. filed June 29, 2010); *Awad v. Obama*, No. 10-736 (U.S. filed Nov. 30, 2010); *Mohammed v. Obama*, No. 10-746 (U.S. filed Nov. 5, 2010); *Khadr v. Obama*, No. 10-751 (U.S. filed Dec. 2, 2010); and *Kiyemba v. Obama*, No. 10-775 (U.S. filed Dec. 8, 2010) (Petition for Certiorari).[8] *Al-Adahi* is most assuredly not an isolated case.

The D.C. Circuit appears intent on reversing the effect of this Court's decision in *Boumediene*. The new mathematical conditional probability standard of review and the al Faroq presumption are part of a Guantánamo pattern. The author of *Al-Adahi* in the Court of Appeals also wrote *Rasul v. Bush*, 321 U.S. F.3d 1134 (D.C. Cir. 2003), *rev'd*, 542 U.S. 466 (2004); *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd*, 548 U.S. 557 (2006); and *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev'd*, 553 U.S. 723

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[8] Petitions in *Mohammed, Khadr and Kiyemba* challenge other aspects of the circuit's treatment of Guantánamo cases.

(2008). As a senior judge, the author of *Al-Adahi* is added to randomly assigned two-judge panels and often hears Guantánamo cases. He has all but announced a public agenda. In his lecture entitled "The Guantanamo Mess", he stated publicly that this Court erred in *Boumediene*. Judge A. Raymond Randolph, *The Guantanamo Mess*, The Center for Legal and Judicial Studies--Joseph Story Distinguished Lecture (Oct. 10, 2010), http://www.heritage.org/Events/2010/10/Guantanamo-Mess. No prevailing petitioner has survived a trip to that court,[9] and multiple petitions for certiorari now pending--and more are coming--in Guantánamo cases seeking this Court's attention.

The court of appeals radically departed from this Court's dispositive precedent in *Anderson*, creating a new standard of review applicable to all civil non-jury cases. It is one thing to argue about detention standards and this Court's decision in *Boumediene*, but to announce a wholesale departure from a settled rule of appellate review just to ensure the continued detention of a single Guantánamo detainee is difficult to explain, except as flowing from the circuit court's passionate animosity to the Guantánamo cases and, perhaps, this Court's repeated reversals of its decisions. Whatever the explanation, it is no warrant to rewrite appellate review in all non-jury civil cases. The price of the circuit court's determined assault on *Boumediene* is, in this case, a reconfiguration of the roles of trial and appellate courts.

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[9] One case was remanded to the district court following denial of the writ. *Bensayah v. Obama*, 08-5537 (D.C. Cir. June 28, 2010).

C. Our system of justice does not work if lower courts ignore the decisions of this Court.

When the Court decided *Anderson* in 1985, its clarification of the deference due to district courts sitting as fact-finders was based on a desire to preserve the effectiveness of the federal judiciary. The judicial system works best, this Court held, when non-jury civil trials in the district courts receive great deference on appeal.

> The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of the fact determination at a huge cost in diversion of judicial resources. . . .[T]he trial on the merits should be the main event . . . rather than a tryout on the road.

Anderson, 470 U.S. at 574-75.

This consideration applies to cases of all types, regardless of their subject matter, legal significance, or controversial nature. Indeed *Anderson* was an otherwise utterly unremarkable case involving a dispute over events at a meeting of a minor municipal committee in a small town. There, as here, the court of appeals was convinced that it would have decided the facts differently. In the interests of system-wide judicial efficiency, this Court stepped in to reverse, as it should here.

But, of course, this case involves much more important and controversial legal issues than *Anderson* did--whether district courts may follow *Boumediene*. The circuit's reversal here raises a second, entirely independent reason calling for this Court's intervention: the imperative of seeing its rulings enforced by the lower courts, regardless of disagreement with the decisions, an imperative the importance of which is at its height in cases involving controversial issues of constitutional law.

Unless the lower courts follow this Court's decisions, even if they disagree with its opinions and the constitutional provisions they enforce, the Court is reduced to writing law review articles. That is the fundamental reason why this Court, in *Cooper v. Aaron*, 358 U.S. 1 (1958), went to such lengths to reaffirm that lower courts are bound to adhere faithfully to the Court's rulings.

Unwilling to abide the commands of *Boumediene*, the court of appeals has thwarted the intent and rule of that decision at every turn.[10] *Al-Adahi* is evidence that the court will create new and dangerous theories to overturn the findings of trial judges. Presuming that this Court meant what it said in *Boumediene*, it should grant certiorari and reverse.

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[10] *See, e.g., Kiyemba v. Obama*, No. 10-775 (U.S. filed Dec. 8, 2010) (Petition for Certiorari). In *Kiyemba* the same circuit court judge ruled that there is no judicial power to direct the release of any Guantánamo prisoner, despite--and without mentioning--this Court's holding in *Boumediene* that the trial court must have the power in a Guantánamo case to issue "if necessary, an order directing the prisoner's release." *Boumediene*, 553 U.S. at 723.

CONCLUSION

Petitioner Al-Adahi, who will observe his ninth anniversary in Guantánamo about the time the Court considers this petition for certiorari, respectfully urges that this Court review his case and reverse the decision of the court of appeals.

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